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CASES ON COMMERCIAL LAW

CONTRACTS, AGENCY, SALES,
NEGOTIABLE PAPER,
PARTNERSHIPS,
CORPORATIONS

By ALFRED W. BAYS

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of Commercial Law in Northwestern University School of Commerce

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PREFACE

These cases have been prepared for the use of students in Commercial Law.

When the writer took charge of the Commercial Law classes in Northwestern University, some years ago, he doubted whether he could profitably use cases as material for assigned lessons, and he therefore relied upon mimeographed notes in the form of a text, using cases only in brief paraphrase as illustrations, and these notes were afterwards put in type and published in the form of small hand books. But it was noticed that when the writer dwelt in his lectures on the facts of actual cases and stated the court's decision and read from the opinion, the student seemed deeply interested, and retained the matter better in his memory than other parts of the work. From this experience, the writer became convinced of the value of the use of cases, in his classes, and he has used them in mimeograph form in connection with text for some time with considerable success.

The "case system" of law study for those whom we may term professional law students has been so widely adopted and approved in law schools that anything said in its behalf would seem superfluous and presumptuous. A word or two in its justification may seem desirable when applied to those who are taking up the study temporarily and briefly for business and general cultural purposes.

That there are differences of an important nature between the professional and non-professional student of law, and that these must be dealt with in practical ways, is very true. For, the law student makes the study of the law the beginning of his life work; its importance is direct and vital. His ambitions, plans, hopes, his keenest self-interests all center around his study. Usually, also, he devotes his entire working time to its pursuit. He realizes that the chief objective of his student career is to train his mind for a work that will begin after he leaves school. The non-professional student takes up the study of law in an entirely different

view point. His chief interests are elsewhere. Usually, only a fraction of his time is devoted to its study. And in his school work he not only makes a beginning but an ending of his study of the subject. He has, therefore, an entirely different goal to be attained than that of the professional law student.

To teach this student, under these circumstances, law in any final sense, is of course beyond the bounds of possibility. The writer once heard from one of his students of a prodigy who had *learned* commercial law. He had read the book thereof and mastered the subject. He could solve any problem that could be put to him. Unfortunately, the rest of us are limited in our powers. And it seems to the writer that one of the first things that the student should be taught is this: that he is entering upon the study of a subject that is as broad as human endeavor, of endless application, and of ever changing condition, and that even by a life time of study there is no such thing as finally mastering it or any of its branches. To offset this discouraging information, he should be advised that in its study he may hope to learn certain fairly permanent principles and rules and to acquire information that will enable him to answer for himself many questions that will present themselves, and, what is perhaps of greater importance, that he may recognize legal problems, *as* problems, and avoid pitfall by seeking professional advice, where necessary; and that he can find no better subject as a study for general cultural purposes. To recapitulate, the student should acquire:

- (1) A realization of the character, source and universality of law;
- (2) A practical working knowledge, enabling him to be more efficient and safe in his business affairs;
- (3) The general broadening and enlightenment of his mind.

In the accomplishment of these ends, the cases as the chief part of his study seem better adapted than mere text or lecture. In the case, the student sees law in its relationship to life; he learns that it is principle applied to varying sets of facts; he understands the character of law and the nature of its development.

The case not only informs him, but it has a dramatic value that arouses and holds his interest.

The stage is set with real characters. No longer is the truth unconnected with actual human conduct. The student sees men situated as he has been, or may be situated. And it is in connection with these facts that the judge's exposition of the law

is made, wherein at some length he announces the principle, applies it, and limits, distinguishes, and harmonizes.

The case system enables the student, and to an extent requires him, to make some original research in first hand material. It encourages independence of thought. The case is to him somewhat as the cadaver is to the medical student.

But the instructor must remember in using the case system that his vision is not the vision of the student. The student must be led; he must be shown the way; he must be kept within the proper bounds. He must be led up into the high places and shown the field that he is to traverse so that the whole may be properly correlated to its parts; the teacher must accompany the inquirer upon the journey, explaining, asserting and guiding. Hence the value of lecture, of text, of quiz. Without these helps the student gropes blindly.

In this book there has been an attempt to arrange the cases under such an outline and with such explanatory and connecting notes as to give unity and completeness to the subjects covered. Two difficulties have been encountered. One is to present the subjects covered within the range of a moderately priced volume, and the other is, the final spurt that was required to furnish the book within the time planned for. But on the whole the editor has produced a book fairly satisfactory for his own purposes and trusts it will prove so to those who have indicated or may indicate a purpose to use it.

The book contains nearly eleven hundred pages, and the development of some phases has been necessarily limited, but topics of a merely technical or peculiarly confusing character or having a remote importance have been purposely omitted or slighted.

The book should be useful in all schools teaching the subjects included, except perhaps in courses of very elementary nature. It should be accompanied with such text, or other helps, as the instructor deems advisable. Questions follow each case, and it is thought these will be very helpful.

It is perhaps unnecessary to add that the editor of these cases has made very free paraphrases of the facts, and made omissions from lengthy opinions.

ALFRED W. BAYS.

NORTHWESTERN UNIVERSITY,
Chicago, November, 1914.

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DIVISION A
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CONTRACTS

CASES ON COMMERCIAL LAW

DIVISION A

CONTRACTS

- Part I. The Formation of Contracts.
- Part II. The Interpretation of Contracts.
- Part III. The Operation of Contracts.
- Part IV. The Discharge of Contracts.

PART I

THE FORMATION OF CONTRACTS

- | | | |
|----------------|---------------|---|
| Chapter One. | Introductory. | |
| Chapter Two. | { | Competency of Parties. <i>Elements of</i> |
| Chapter Three. | | Offer and Acceptance. <i>a contract</i> |
| Chapter Four. | | Consideration. |
| Chapter Five. | { | Legality of Object. <i>subject matter</i> |
| Chapter Six. | | Form and Evidence of Contract. |

CHAPTER ONE

INTRODUCTORY

§ 1. Definition.

§ 2. Kinds of contracts.

Sec. 1. Definition.

Case No. 1. Sir William R. Anson. Principles of the English Law of Contracts (Knowlton's Edition). Pages 1 to 10. “* * * Contract results from a combination of the two ideas of Agreement and Obligation. Contract is that form of Agreement which directly contemplates and creates an Obligation: the contractual Obligation is that form of Obligation which springs from Agreement. * * * Agreement requires for its existence at least two parties. There may be more than two. * * * The parties must have a distinct intention common to both. * * * The parties must communicate to one another their common intention. * * * The intention of the parties must refer to legal obligations. * * * It must have reference to legal rights and duties as opposed to those of a social character. * * * The consequence of Agreement must affect the parties themselves. * * * But Agreement * * * seems to be a wider term than contract. It includes acts in the law of two kinds besides those which we ordinarily term Contracts. These are: (1) Agreements the effect of which is concluded so soon as the parties thereto have expressed their common consent. Such are conveyances and gifts * * * (2) Agreements which create obligations incidental to transactions of a different and

wider sort. * * * Marriage for instance, * * * So, too, a settlement of property in trust. * * * These obligations are the result of Agreement, yet they are not Contract. * * * Obligation is a legal bond whereby constraint is laid upon a person or group of persons to act or forbear on behalf of another person or group. * * * And so we are now in a position to attempt a definition of contract, or the result of the concurrence of Agreement and Obligation. And we may say that it is an *Agreement enforceable at law, made between two or more persons, by which rights are acquired by one or more to acts or forbearances on the part of the other or others.*”

Question 1: Define a contract. What are the “two ideas” from which contract results?

Sec. 2. Kinds of Contracts.

(Note: To indicate the scope and nature of contractual liability, we may classify contracts from various standpoints. The great historic and basic division of contracts is that into *formal* and *informal* contracts. Formal contracts are characterized by their *form*, and are binding because of that form without regard to *consideration*, which is the essential characteristic of informal contracts. Formal contracts include so-called contracts of record, as judgments and recognizances and *contracts under seal*, also called specialties. Informal contracts are those contracts not of record or under seal, whether in writing, oral or implied. Informal contracts are the more important in modern commercial life, and in some jurisdictions formal contracts have ceased to exist as such and in most jurisdictions have lost some of their characteristics. The great majority of mercantile contracts are simple or informal contracts. Contracts may be also regarded as *bilateral*, when in their inception they consist in mutual promises, or *unilateral* when they consist of an act done on one side to support an unperformed promise on the other. Contracts are also executory or executed, and may be executory on both sides (bilateral) or on one (unilateral). Contracts are also *express* when they consist in written or spoken word, and *implied* when inferred from conduct. The differences herein indicated will be elaborated in the subject matter to follow.)

CHAPTER TWO

CAPACITY OF PARTIES TO CONTRACT

- | | |
|------------------------------------|------------------------------------|
| A. Capacity of parties in general. | C. Capacity of other parties under |
| B. Capacity of minors. | disability. |

A. Capacity of Parties in General.

(Note: In our definition of a contract as a certain type of agreement between two or more parties, we assume that the state in its public policy permits parties to enter by agreement into obligations toward each other. To the question "Who may make a contract?" we must return the obvious answer that *any* person in the community, of *normal legal status* may freely contract. Who are those of *abnormal* legal status—those upon whom for some reason, the law has imposed a limitation with respect to freedom of contract? They may be conveniently grouped into two general classes—those who have not yet reached the age at which the law confers upon them the full legal powers of the individual (whom we call *minors* or *infants*); and those who, without respect to age, are, on grounds of public policy, deprived by positive law of full legal powers.)

B. Capacity of Minors.

- | | |
|--|---|
| § 3. Who are minors. | § 7. What constitutes ratification. |
| § 4. The general rule: Contracts of minors voidable by them. | § 8. Minor's contracts for necessities. |
| § 5. Minor's contracts voidable under what conditions. | § 9. Minor's liability in tort in cases connected with contracts. |
| § 6. Minor's contracts voidable at what times. | |

Sec. 3. Who Are Minors.

(Note: A minor is one who has not reached the age fixed by law at which he comes into full legal powers. At common law this age was twenty-one both for males and females. By statute in some states females are of age at eighteen years.)

Sec. 4. The General Rule—Contracts of Minors Voidable by Them.

Case No. 2. Coursole v. Wyerhauser, 69 Minn. 328.

Facts: In 1856, there was issued by the U. S. government to plaintiff, a half-blood Sioux Indian, 320 acres of land in what was commonly called "half-breed script." In January, 1870, when the plaintiff was 20 years of age, he, representing himself to be of age, for a valuable consideration made out two powers of attorney purporting to constitute one Dorr his agent to select and locate the land and to sell and convey the same. Dorr, in 1874, located the land in controversy and sold it to Brown, who resold it to various parties until it came by mesne conveyances to the present defendants. Plaintiff now in 1895, brings this suit to contest defendant's title, claiming that his power of attorney in 1870 was void on account of his infancy, and that his conduct since that time cannot be considered as ratification on the principle that a void act cannot be ratified.*

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Points Involved: Whether contractual acts of minors in general are void or voidable. Specifically, whether the act of a minor in appointing an agent to sell his real estate is merely voidable and therefore subject to ratification by him, or absolutely void, and therefore of no legal effect.

MITCHELL, J.: "The rule is that the act to be ratified must be voidable merely, and not absolutely void; and the question remains—which to our minds is the most important one in the case—whether the act of a minor in

voidable act may be ratified;
void act cannot be ratified
Deals with real property.

appointing an agent or attorney is wholly void, or merely voidable. Formerly the acts and contracts of infants were held either void, or merely voidable, depending on whether they were necessarily prejudicial to the infant. Latterly the courts have refused to take this responsibility, on the ground that, if the infant wishes to determine the question for himself on arriving at his majority, he should be allowed to do so, and that he is sufficiently protected by his right of avoidance. Hence the almost universal modern doctrine is that all the acts and contracts of an infant are merely voidable. Upon this rule there seems to have been ingrafted the exception that the act of an infant in appointing an agent or attorney, and consequently all acts and contracts of the agent or attorney under such appointment, are absolutely void. This exception does not seem to be founded on any sound principle, and all the text writers and courts who have discussed the subject have, so far as we can discover, conceded such to be the fact.

“On principle, we think the power of attorney of an infant, and the acts and contracts made under it, should stand on the same footing as any other act or contract, and should be considered voidable in the same manner as his personal acts and contracts are considered voidable. If the conveyance of land by an infant personally, who is of imperfect capacity, is only voidable, as is the law, it is difficult to see why his conveyance made through an attorney of perfect capacity should be held absolutely void. It is a noticeable fact that nearly all the old cases cited in support of this exception to the general rule are cases of technical warrants of attorney to appear in court and confess judgment. In these cases the courts held that they would always set aside the judgment at the instance of the infant, but we do not find that any of them go as far as to hold that the judgment is good for no purpose and at no time.

“The courts have from time to time made so many exceptions to the exception itself that there seems to be very little left of it, unless it be in cases of powers of at-

torney required to be under seal, and warrants of attorney to appear and confess judgment in court. See Freeman's note to *Craig v. Van Bebber*, 18 Am. St. Rep. 629 (s. c., 100 Mo. 584, 13 S. W. 906); Schouler, Dom. Rel. Sec. 406; Ewell's Lead. Cas. 44, 45, and note; Bishop, Cont. Sec. 930; Metcalf, Cont. (2d Ed.) 48; *Whitney v. Dutch*, 14 Mass. 457-463; *Bool v. Mix*, 17 Wend. 119-131.

"Hence, notwithstanding numerous general statements in the books to the contrary we feel at liberty to hold, in accordance with what we deem sound principle, that the power of attorney from plaintiff to Dorr, and the deed to Brown under that power, were not absolutely void because of plaintiff's infancy, but merely voidable and that they were ratified by him after attaining his majority."

Question 2: (1.) State the facts, the specific question presented and the Court's decision in the above case.

(2.) Why was it important to determine in the above case whether the power of attorney was *void* or *voidable*?

(3.) What was the early test whether an infant's contract was binding on him?

(4.) What constituted ratification in the above case? ?

(5.) State the present general rule as to a minor's power to make a contract.

(6.) Is it your opinion that the other party to the contract may raise the point of the infancy of the minor, in order to avoid his contract, if the minor himself does not raise it? 7

(Note: While the courts of the United States are in unison in holding the general rule to be that the contracts of a minor are voidable and not void [except the implied contracts to pay for necessities received by the minor which are neither voidable nor void, but binding], they differ as to the power of a minor to appoint an agent, especially agents with formal powers to confess judgments, sell real estate, etc. See the authorities cited in the above opinion. See also *Hiestand v. Kuns*, 8 Blackf. (Ind.) 345; *Cole v. Pennoyer* (obiter), 14 Ill. 158, *contra* to above case.)

Case No. 3. *Wuller v. Chuse Grocery Co.*, 241 Ill. 398.

Facts: Wuller, while a minor, subscribed and paid for 15 shares of stock in the Grocery Co. at the par value of \$1,500. He also acted as secretary and treasurer, and was a salesman and bookkeeper of the corporation at a salary of \$12.00 and \$15.00 a week for about two years and a half. At the end of that time, being still a minor, he brings a suit to recover the \$1,500 so paid, tendering back the stock. He had judgment below and the Grocery Company appeals. *

Points Involved: Whether the executed contract of a minor in reference to personal property is voidable by him. Whether being emancipated or in business makes any difference.

DUNN, J.: "The position of the appellant (defendant) is that an infant, having advanced money upon a contract voidable because of his infancy, cannot rescind the contract and recover the money. * * * If the fact that the payment of money upon his contract was voluntary precluded its recovery, the right to avoid the contract would be no protection to an infant against his inexperience and the wiles of swindlers and cheats. Such voluntary payment may be recovered upon the avoidance of the contract. The consideration, or such part of it as remains in the possession or control of the minor must be returned, but if he has lost or expended it, so that he cannot restore it, he is not obliged to make restitution. Contracts concerning personal property and executory agreements may be avoided by the infant either during or after his minority. The shares of capital stock of a corporation are personal property, the same as promissory notes or bonds. An infant's purchase of such stock is voidable, and he may, at his election, avoid it and recover the purchase money. The appellee having offered to return the stock which he had received under the contract, was entitled to the return of the purchase money he had paid. The certificate of stock held by the appellee was merely the evidence of his rights as a stockholder. The contract by which he became a stockholder having

Deals with personal property.

If the minor has on his hands the consideration received as a minor he must return it before he can get his money back.

been avoided, the decree properly provided for the cancellation of the certificate, which amounted, in effect, to the surrender of the stock by appellee and its restoration to appellant.

"The contract of an infant is, in general, voidable by him, and gains no additional force from the fact that he is engaged in business for himself or is emancipated.* The exercise of his right to disaffirm his contract may operate injuriously and unjustly against the other party, but the right exists for the protection of the infant against his own improvidence and may be exercised entirely in his discretion. The fact that the contract has been executed is immaterial; there is no distinction between executed and executory contracts so far as the right of disaffirmance is concerned."

Question 3: (1.) State the facts, the question presented and the decision of the court in the above case.

(2.) May a minor avoid his contract as to personal property before he becomes of age? After he becomes of age?

(3.) Does the fact that a minor is in business for himself affect his contracts? Suppose he is emancipated?

(4.) Does the fact that a minor cannot restore what he has received, under the contract, affect his right? (See note, p. 11.)

(Note: In a few states (e. g., Georgia, Iowa) it is provided, that where a minor is in business for himself, his contracts in respect to such business shall be binding upon him. But it is held that one who merely works for another is not in business for himself within the meaning of such a statute. *Bieckler v. Guenther*, 121 Ia. 419.)

Case No. 4. *Derocher v. Continental Mills*, 58 Maine, 217.

Facts: This is a suit brought by a minor against Continental Mills for 25½ days' work at \$1.25 per day. The minor had agreed to work at least six months and not to leave except upon giving two weeks' notice. He left before the time agreed upon had expired and without

* Child is enjoying his own wages, parents have indicated that they will allow the minor to use his own wages. marriage results in emancipation.

giving any notice. The defendant contended and the trial court held that the defendant was entitled to have the damages caused by plaintiff's leaving deducted from the wages he would otherwise be entitled to recover. The minor appeals.* *

Point Involved: Whether a minor's contract to perform personal services is voidable by him. Whether upon abandoning such contract he is entitled to recover the value of his services.

WALTON, J.: “* * * To compel the minor thus to make good the loss occasioned by the non-performance of his contract is virtually to enforce the contract; and thus to enforce the contract is in effect to abrogate the rule of law that a minor is not bound by his contract. We presume no one would undertake to maintain that an action would lie against an infant to recover damages for the breach of such a contract; and yet it seems to us that there can be no difference in principle between deducting the damages from the amount which the infant would otherwise be entitled to recover in a suit brought by him and recovering the same in a suit brought against him. Stripped of all its sophistical surroundings, we think the doctrine contended for in defense amounts to simply this, that the minor's contract not to leave without giving two weeks' notice was obligatory, and having violated it, he must pay the damage. Such a doctrine cannot be maintained.

“* * * * *

“Having avoided his contract to work not less than six months and not to leave without giving two weeks' notice, the plaintiff had a right to have his case tried and determined precisely as if no such contract had ever been made.” (New trial granted.)

Question 4: (1.) State the facts and the court's decision in the above case.

(Note: See case No. 5 for right of minor to avoid his contracts with reference to real estate.)

* 4 Involves services.

Sec. 5. Minor's Contracts Voidable Under What Conditions.

(See also case No. 3.)

Case No. 5. Green v. Green, 69 N. Y. 553.

Facts: Plaintiff sues defendant for trespass to his real estate. Defendant answers that the land is his own. Defendant, who is the son of plaintiff, transferred the land to his father for \$400, defendant being at that time 18 years of age, now an adult. Before becoming of age defendant had wasted the money received for the land. After becoming of age he entered the land to reassert title thereto, which act is the alleged trespass for which he is now sued.

Point Involved: Whether a minor as a condition to the avoidance of his voidable contracts must restore the benefits he has received, or account for their value.

CHURCH, C. J.: “* * * The right to repudiate is based upon the incapacity of the infant to contract, and that incapacity applies as well to the avails as to the property itself, and when the avails of the property are improvidently spent or lost by speculation or otherwise during minority, the infant should not be held responsible for an inability to restore them. * * * The right to rescind is a legal right established for the protection of the infant, and to make it dependent upon performing an impossibility, which impossibility has resulted from acts which the law presumes him incapable of performing, would tend to impair the right and withdraw the protection. Both upon authority and principle, we think a restoration of the consideration could not be exacted as a condition to a rescission * * *.”

(Note: Where a minor has received the benefit of a fair contract, the weight of authority is, that if he cannot restore what he has received he cannot sustain his own suit to rescind, though, had he not performed, he would have a perfect defense in a suit against him, notwithstanding his inability to restore. Thus in Case No. 11 doubtless the minor could not have prevailed in a suit to recover had he paid the tradesman.)

Question 5: State the facts, the specific question presented and the court's decision in the above case.

Sec. 6. Minors' Contracts Voidable at What Times.
(See also Case No. 3.)

Case No. 6. Scott v. Buchanan et al., 30 Tenn. 468.

Facts: Suit to eject defendants from certain lands. Defendants claim title through a deed given by plaintiff during her minority. Plaintiff is now an adult.

Point Involved: That the deed of an infant is voidable; the time at which it may be avoided, and the manner of avoidance. Also what constitutes a ratification by which the right to avoid is lost.

TOTTEN, J.: “* * * The better opinion seems to be that a sale of chattels by an infant may be avoided during infancy, but that a sale of lands cannot be avoided by him till he become of age. The act of avoidance in relation to his personalty is allowed him during infancy, as it may be the more necessary to his personal interest, but is not allowed him as to his realty, because of his supposed indiscretion to exercise it, and as its exercise during infancy may not be so material to his interest. * * *

3 { “The deed of an infant may be avoided after he come of age, by executing a deed to a third person for the same land, that being an act of like character and notoriety with the first; or by making an entry upon the land, reclaiming it and declaring his dissent to his deed [See case No. 5, *supra*]; or, as we apprehend, by suit for the land, without having made any previous entry. * * *

“In the next place, what will amount to an affirmance of the voidable deed? The court instructed the jury that this might be by express ratification, or by acts which reasonably imply an affirmance, or by an omission to disaffirm the deed in a reasonable time. * * *

“We see nothing unjust or inconvenient in the rule which requires the party within a reasonable time after he arrive at full age, to make his election whether he will

stand to or abide by his voidable contract made during infancy. On the contrary, it would be highly unjust and inconvenient to the other party, who is bound by the contract and has no right to avoid it, to be held subject to an indefinite period to his right of election. * * *

Question 6: (1.) When can a minor disaffirm his deeds of conveyance? *When he becomes of age.*

(2.) May he avoid his other voidable contracts before becoming of age? *sale of chattels. # see also case 3.*

(3.) In what ways may an infant avoid his deed of conveyance?

(4.) In what ways may one ratify his deeds, voidable on the ground of infancy?

Note: By statute or judicial decision in many states the "reasonable" time in which an infant may disaffirm after he becomes of age has been crystallized into a certain time, as, say, three years, but he may of course deprive himself of the full statutory period by a ratification before that time.

It should always be borne in mind that an act of ratification is *irrevocable*. When one has ratified what was before that time voidable, his right to avoid has gone.

Sec. 7. What Constitutes Ratification.

(a) A minor cannot ratify.

(b) Failure to disaffirm as ratification.

(a) A Minor Cannot Ratify.

Case No. 7. Sanger v. Hibbard et al., 104 Fed. 455.

Facts: Sanger, while a minor, purchased goods from Hibbard Brothers and others, for use by him as a retail dealer. Later, Hibbard Brothers and others sued out attachment proceedings against the goods. Sanger, under statutory authority, gave a bond to dissolve the attachment, one of his creditors becoming surety thereon, and such creditor afterwards receiving the proceeds from the sale of the goods in satisfaction of his claim. It is asserted that by giving the bond the minor (who

authorizes the plaintiff to obtain the possession of the property for which judgment is sought and said that his judgment is obtained.

is still under age) ratified his contract or estopped himself from setting up his minority.

Point Involved: Whether a minor, while still a minor, can ratify his voidable contracts or estop himself to set up his minority.

CALDWELL, CIRCUIT JUDGE: “* * * The rule is well settled that an infant has an absolute right to disaffirm and avoid his contract for the purchase of property with which to enter into trade. He can repudiate his contract to pay for property purchased for such a purpose, and the seller has no redress unless the property purchased remains in the possession and control of the infant. In such case the infant’s repudiation of his contract revests the title to the property sold in the vendor, who may recover it in a proper action for that purpose. * * * It is not claimed that he (the minor) ratified the contract or did any act to estop him setting up his defense after he had attained his majority, and the claim that the execution of the bond to dissolve the attachment during his infancy operated as an affirmation of the contract or as an estoppel is untenable. * * * A minor can neither make nor affirm a contract of this character during his infancy. The rule which precludes him from making a [binding] contract precludes him from ratifying it. * * *”

Question 7: Can a party who has contracted with a minor set up that the minor has lost his right to avoid his contract because while still a minor he ratified it? Why?

(b) Failure to Disaffirm as Ratification.

(Note: *Mere* failure to disaffirm after becoming of age (except in respect to deeds of conveyance, as we noticed) is not ratification, but there must be some accompanying act or circumstance inconsistent with disaffirmance, as a sale or use of the property. Thus, A sells B a bicycle. B uses and destroys the bicycle while still a minor. On becoming of age, B’s failure to positively disaffirm, is not ratification by him. But if B sold the bicycle *after* becoming of age, or by his conduct or language fairly showed that

he meant to stand by his contract, he would thereby ratify the contract.

See also Case No. 6 on this subject.)

Sec. 8. Minor's Contracts for Necessaries.

Case No. 8. Nash v. Inman, (1908), 2 K. B. 1, 1 British Ruling Cases 143.

Facts: Defendant, a minor, was a freshman at Trinity College, Cambridge, in October, 1902. The plaintiff, a tailor, sent a traveling salesman to Cambridge to solicit orders. The salesman heard that the defendant was spending money very freely and he called upon him, and between Oct. 29, 1902, and June 16, 1903, the defendant had run up a bill of \$1,451 for clothing of an extravagant and ridiculous style. Defendant was already adequately supplied with clothing by his father. Plaintiff sues for the price and defendant pleads infancy. Defendant had judgment below and plaintiff appeals.

Points Involved: What is the nature of the liability of a minor to pay for necessities furnished him? What are necessities? Is the test solely the nature of the goods sold, or must the minor's actual present needs in respect to such goods also be considered?

FLETCHER-MOULTON, L. J.: "I think that the difficulty and at the same time the suggestion of hardship to the plaintiff in such a case as this disappear when one considers what is the true basis of an action against an infant for necessities. It is usually spoken of as a case of enforcing a contract against the infant, but I agree with the view expressed by the court in *Rhodes v. Rhodes* (1890) 44 Ch. D. 94, 59 L. J. Ch. N. S. 298, 62 L. T. N. S. 342, 38 Week Rep. 385, in the parallel case of a claim for necessities against a lunatic, that this language is somewhat unfortunate. An infant, like a lunatic, is incapable of making a contract of purchase in the strict sense of the words; but if a man satisfies the needs of the infant or lunatic by supplying to him necessities, the law will imply an obligation to repay him for the

services so rendered, and will enforce that obligation against the estate of the infant or lunatic. The consequence is that the basis of the action is hardly contract. Its real foundation is an obligation which the law imposes on the infant to make a fair payment in respect of needs satisfied. In other words, the obligation arises *re* and not *consensu*. I do not mean that this nicety of legal phraseology has been adhered to. The common and convenient phrase is that an infant is liable for goods sold and delivered, provided that they are necessaries, and there is no objection to the phraseology so long as its true meaning is understood. But the treatment of such actions by the courts of common law has been in accordance with that principle I have referred to. That the articles were necessaries had to be alleged and proved by the plaintiff as part of his case, and the sum he recovered was based on a *quantum meruit*. If he claimed anything beyond this he failed, and it did not help him that he could prove that the prices were agreed prices. All this is very ancient law, and is confirmed by the provisions of No. 2 of the sale of goods act, 1893,—an act which was intended to codify the existing law. That section expressly provides that the consequence of necessaries sold and delivered to an infant is that he must pay a reasonable price therefor.

“The sale of goods act, 1893, gives a statutory definition of what are necessaries in a legal sense, which entirely removes any doubt, if any doubt previously existed, as to what that word in legal phraseology means. (The Lord Justice read the definition.) Hence, if an action is brought by one who claims to enforce against an infant such an obligation, it is obvious that the plaintiff in order to prove his case must show that the goods supplied come within this definition. * * * That is to say, the plaintiff has to show, first, that the goods were suitable to the condition in life of the infant; and, secondly, that they were suitable to his actual requirements at the time,—or, in other words, that the infant had not at the time an adequate supply from other

sources. There is authority to show that this was the case even before the act of 1893. * * *

“* * * the judge came to the conclusion, to use the language of the court in *Ryder v. Wombwell*, *supra*, that there was no evidence on which the jury might properly find that these goods were necessary to the actual requirements of the infant at the time of the sale and delivery, and therefore, in accordance with the duty of the judge in all cases of trial by jury, he withdrew the case from the jury and directed judgment to be entered for the defendant. In my opinion he was justified by the practice of the court in so doing, and this appeal must be dismissed.”

Question 8: (1.) State the facts in the above case, the specific question presented and the court's decision thereupon.

(2.) Suppose that a minor buys an overcoat, admittedly a necessary for him, and agrees to pay the sum of fifty dollars therefor, can he be held to that price? Why?

(3.) Where the minor purchases an article that would be a necessary for him were he not already adequately supplied, is the burden of proof on the seller to show both that the article comes within the class of goods that may constitute necessities and also that the purchasing minor was as a fact not adequately supplied?

(Note. Answer to question 8 (3). The above case holds that the burden of proof is on the seller to show that the goods were necessities to the minor (taking into consideration his station in life), and also that the minor was not being supplied from other sources. In a note to this case in 1 *British Ruling Cases*, at page 159, it said: “To summarize, it may be said that while the decisions are harmonious, where it appears that an infant lives with his parents or is under the care of a guardian, that one who seeks to charge the infant for articles otherwise conceded to be necessities must, in order to overcome the presumption that he was properly supplied, show that such is not the case, there is a conflict of opinion whether or not, where the infant does not live with his parents, nor is under the care of a guardian, the burden is upon the plaintiff to show that the infant was not sufficiently provided.”)

Case No. 9. Coke upon Littleton, 172 (a) "An infant may bind himself to pay for his necessary meat, drink, apparel, necessary physic, and such other necessities, and likewise for his good teaching and instruction whereby he may profit himself afterward."

Question 9: How did Lord Coke classify necessities?

Case No. 10. Gregory v. Lee, 64 Conn. 407.

Facts: Lee, a minor aged 19 years, was a student at Yale college. He engaged rooms of Gregory for the school term of 40 weeks at \$10 per week. He occupied the rooms only about three months and then engaged rooms elsewhere. G. was unable to rent the rooms for the balance of the term and now sues L. for such period.

Points Involved: Generally, what are necessities? Specifically, can a minor be held on an executory contract for necessities?

TORRANGE, J.: "* * * Under the facts stated it must be conceded that this room, at the time the defendant occupied it and during the time he hired it, came within the class called 'necessaries,' * * * for lodging comes clearly within the class of necessities, and the room in question was a suitable and proper one. * * * Things necessary are those without which an individual cannot reasonably exist. In the first place, food, raiment, lodging and the like. About these there is no doubt. So long then as the defendant actually occupied the room as his sole lodging room it was clearly a necessary to him, for the use of which the law would compel him to pay * * *. The question now is whether he is bound to pay for the room after December 20, 1892 (when he abandoned it). The obligation of an infant to pay for necessities actually furnished to him does not seem to arise out of a contract in the legal sense of that term, but out of a transaction of a quasi-contractual nature; for it may be imposed on an infant too young to understand the nature of a contract at all.

* * * And where an infant agrees to pay a stipulated price for such necessities, the party furnishing them recovers not necessarily that price, but only the fair and reasonable value of the necessities. * * * This being so, no binding obligation to pay for necessities can arise until they have been supplied to the infant; and he cannot make a binding executory agreement to purchase necessities. * * * In this case the defendant gave up the room and repudiated the agreement so far as it was in his power to do so, in the most positive and unequivocal manner. The plea of infancy, then, under the circumstances, must prevail. * * *

Question 10: State the facts in the above case, the specific question involved and the court's decision thereupon.

Case No. 11. Wharton v. McKenzie, 5 Q. B. 606.

Facts: A was a minor, attending college away from home and boarding at the University Commons. He was a gentleman of rank and fortune and from time to time gave dinners in his lodgings to his acquaintances, and for that purpose obtained on his credit from B, a tradesman, meats, fruits and confectionery. Failing to pay his account, B sued him, and he pleaded infancy.

Point Involved: Are expensive dinners purchased by a minor of rank and fortune for the entertainment of his friends, necessities?

LORD DENMAN, C. J.: “* * * For a young man in some situations in life, not only clothes may be considered necessities, but a watch and the like articles, which he is expected to wear in that condition of life; but with respect to the articles here supplied, it is an outrage to common sense to say they can possibly be necessities. It may perhaps seem harsh and illiberal to refuse payment for these things. But it is the duty of tradesmen to make themselves acquainted with the circumstances of the parties they are supplying. * * * Suppose the son of the richest man in the kingdom to have been supplied with diamonds and race horses, the judge ought

to tell the jury that such articles cannot be necessities.
 * * * It is said we are to look at the circumstances
 of each defendant. True; we must do so. But the
 articles supplied must be necessities, not mere comforts
 or conveniences. * * *”

Question 11: (1.) Suppose A, the son of a wealthy society leader, becomes a member of a social club, are his dues recoverable as for necessities?

(2.) Suppose he purchases an automobile, can he be held for the price?

(3.) What does the court say in respect to his purchase of a watch? (Expensive jewelry not necessary. *Ryder v. Wombell*, L. R. 4 Ex. 32.)

Case No. 12. *Ryan v. Smith*, 165 Mass. 303.

Facts: Suit by Ryan, a minor, to repudiate his contract with Smith for the purchase of a barber shop business and the furniture therein, and to recover back his money paid on account thereof. Plaintiff is a minor with no means of support except out of his own earnings.

Point Involved: Whether the purchase of a business by a minor who has to support himself out of his own earnings is binding upon him?

KNOWLTON, J.: “The only question in this case is whether the judge should have ruled, at the request of the defendant, that the articles purchased by the plaintiff were necessities. They were a barber shop and chair and divers other articles of furniture designed to be used in furnishing a barber shop. The plaintiff was a minor and he had no means of support except what he earned. The law does not contemplate that a minor shall open a shop and become a trader, or the proprietor of a business which involves the making of a variety of contracts. This has long been settled by the authorities.
 * * *. It is clear that the articles in question were not necessities. If they had been hand tools, to a reasonable amount, such as are ordinarily provided by a journeyman and necessary for use in his trade or business, the case would be different.”

Question 12: (1.) State the facts, the question presented and the court's decision in the above case.

(2.) What sort of trade tools would be regarded as necessities under certain conditions?

Sec. 9. Minor's Liability in Tort in Cases Connected with Contracts.

Case No. 13. *Fitts v. Hall*, 9 N. H. 441.

Facts: Plaintiff, having a large quantity of hats for sale, sold them to defendant, first inquiring of defendant if he were of age and being informed that he was. Plaintiff sued defendant for the price and defendant set up and proved he was a minor. Plaintiff now brings suit for damages sustained by reason of the deceit and fraud practiced upon him by defendant.

Point Involved: Is a minor who procures benefits through false misrepresentation as to his age, under a contract voidable by him, answerable in damages for the deceit?

PARKER, C. J.: "The general principle * * * is that an infant is liable in actions *ex delicto* [in tort] * * *. But a matter of contract * * * is not to be turned into a tort in order to charge the infant by change of the form of action. * * *

"But if the tort is subsequent to the contract and not a mere breach of it, but a distinct, wilful and positive wrong of itself, then, although it may be connected with a contract, the infant is liable.

"* * * If infancy is not permitted to protect fraudulent acts, and infants are liable *ex delicto*, * * * there is no sound reason that occurs to us why an infant should not be liable in damages for a fraudulent representation whereby another has received damage. * * * The representation * * * was not part of the contract. * * * No contract was made about defendant's age. * * *

Question 13: (1.) State the facts in the above case, the specific question involved and the court's decision.

(2.) A sells goods to B, a minor, who is 20 years of age, but looks to be 25. Nothing is said about B's age. Is B guilty of fraud in not disclosing his age?

(Note to Case 12. There are some authorities that hold a contrary view to the above decision. Thus, the minor is not held in the English cases: *Johnson v. Pye*, 1 Keble, 913. Also, see *Slayton v. Barry*, 175 Mass. 513. "an unfortunate reversion to the old rule."—Note in 57 L. R. A., p. 678. See the cases collected in that note, beginning page 675.)

Case No. 14. *Towne v. Wiley*, 23 Vt. 355.

Facts: The facts are given in the opinion.

Point Involved: Is a minor liable for wilful injury to the property of another, procured by him under his voidable contract with that other?

REDFIELD, J.: "This is an action on the case, in trover, for the conversion of a certain horse. The facts which appeared on the trial were that the defendant, being an infant of twenty years, hired of the plaintiffs, who were livery stable keepers at Bellows Falls, the horse in question, to go to Brattleboro' and back the same day. He went to Brattleboro' and returned by a circuitous route, nearly doubling the distance, which, in a direct course, is twenty-three miles, at about eight o'clock in the evening went to a house in Westminster, and remained until four o'clock the next morning, the night being cold and windy, and the horse exposed, during the whole night, without shelter or covering of any kind. This was on the thirteenth of July, and the horse, when returned to the plaintiffs, the next morning, was sick, ate nothing, and died in five or six days, from the over driving and exposure. The court charged the jury, that these facts constituted a conversion by the defendant, and that his infancy was no bar to the action, and that the plaintiffs were entitled to recover the value of the horse, at the time of the conversion, which would be when the defendant departed from the use for which he hired the beast.

"The cases upon the subject of the liability of infants,

for torts, when viewed with reference to their facts, may not seem altogether consistent; but when the principle, upon which the courts profess to proceed, is examined, they will all be found to be placed upon the same ground; and no case is to be regarded as authority, except for the principle, upon which the courts professed to proceed in deciding it. In all the cases, then, upon this subject, it will be found that the courts profess to hold infants liable for positive substantial torts, not for violations of contract merely, although, by construction, the party claiming redress may be allowed, by the general rules of pleading, to declare in tort, or contract, at his election. *Jennings v. Rundall*, 8 T. R. 335, was entirely of this character. The form of the action was trespass on the case, for immoderately driving a mare, let to hire by the plaintiff to the defendant, and trover for conversion. The defendant pleaded infancy to the counts for immoderately driving, and the plaintiff demurred, and Lord Kenyon, in giving judgment, speaks of the defendant as a lad. But in every view of the case, the defendant was guilty of a mere omission, a nonfeasance, or breach of the implied contract, to use the beast discreetly and carefully, and he had judgment.

“* * *

“Applying these general principles to the case before us, it seems to us that the distinction taken in the court below is the true one. So long as the defendant kept within the terms of the bailment, his infancy was a protection to him, whether he neglected to take proper care of the horse, or to drive him moderately. But when he departs from the object of the bailment, it amounts to a conversion of the property, and he is liable as much as if he had taken the horse in the first instance without permission. And this is no hardship; for the infant as well knows that he is perpetrating a positive and substantial wrong when he hires a horse for one purpose and puts him to another, as he does when he takes another’s property by way of trespass.”

Bailment arises when one person has personal in his possession which does not belong to him.

Question 14: (1.) State the facts in the above case, the specific question presented and the court's decision.

(2.) A minor hires a horse to drive from Chicago to Evanston, but drives it from Chicago to Wheaton (another direction) and injures it on the way. Can the owner recover damages?

(3.) A, a minor, hires a horse to drive from Chicago to Evanston, and drives it immoderately. Can the owner recover damages?

(4.) A, a minor, made a contract with B, an adult, that he would thresh his grain for him. A was negligent in the performance of his contract and the grain was thereby destroyed by fire. Is A liable to B? (*Lowery v. Cate* [Tenn.] 57 L. R. A. 673.)

C. Capacity of Other Parties Under Disability.

§ 10. Insane parties.

§ 12. Aliens.

§ 11. Married women.

§ 13. Corporations.

Sec. 10. Insane Persons.

Case No. 15. *Ronan v. Bluhm*, 173 Ill. 277.

Facts: Thomas Ronan, was the owner of Lot 10, etc., in Chicago. On April 25, 1882, Ronan conveyed this property to one Thomas Carbine. Carbine did not go into possession of said property, but on the day following conveyed it to his daughter. Two days thereafter, Mary Ronan, daughter of Thomas Ronan, filed a petition in the County Court alleging that Thomas Ronan was and had been for over two years a confirmed drunkard and of unsound mind and asking for the appointment of a conservatrix; and she was appointed. A few days thereafter she, as such conservatrix, filed suit, asking that her father's conveyance to Carbine and Carbine's conveyance to his daughter be set aside, the deed to the daughter being colorable and without consideration. The bill did not offer to return the consideration received by Thomas Ronan.

Point Involved: Is a deed by an insane person who has not legally been declared insane at the time the deed was given, binding, void or voidable?

MR. JUSTICE BOGGS delivered the opinion of the Court:
“* * * The doctrine that a contract may not be rescinded by the court except the party in whose interest the rescission is awarded shall restore that which was received by the virtue of the contract, is applicable, in general, only to contracts made by persons *compos mentis* and under no disability. Whether it is applicable, or, if applicable, to what extent it should be modified to meet particular cases where persons *non compos* have received money or property as the consideration for an agreement, has been much discussed by text writers and is the subject of many, not altogether harmonious, judicial decisions. The rule which seems to commend itself to our sense of justice, and which is supported by what we conceive to be the weight of authority, is that a completed contract of sale of lands by a grantor who is insane but has not been judicially declared insane, for a fair consideration in money or property, to a grantee who entered into the contract without fraudulent intent and without knowledge or notice of the disability of the grantor, will not be set aside in favor of the grantor or his representatives unless the purchase price be returned or the property parted with by the grantee be restored. (*Scanlan v. Cobb*, 85 Ill. 296; *Boswell on Insanity*, secs. 413, 414.) If the grantee, with notice of the incapacity of the insane grantor to manage his estate, invests such grantor with the possession of money or property in exchange for lands, and the said money or property, by reason of the mental incapacity of the grantor, is wasted and lost, or if the grantee, with such knowledge, obtains a conveyance of the lands from such a grantor for a consideration so inadequate as to be inequitable and to evince that it was his intention to take advantage of the infirmity of the grantor and to defraud him, such a grantee would have no standing to invoke the equitable rule that ‘he who asks equity must do equity,’ and demand that under the operation of that maxim a court of equity should refuse to set aside the conveyance except upon the imposition of such terms as would amply protect him from

Insane person must, like minors, have a conservator acting on his behalf.

any loss. Such a rule would be but to guarantee that, although the attempt to fraudulently procure the property of an insane man might fail, yet the perpetrator of the fraud would be protected by law from any loss in the transaction."

Question 15: (1.) Has an insane person the right to avoid his contract? Must he restore the consideration?

(Note: See also, *Blinn v. Schwartz*, p. 275.)

Sec. 11. Married Women.

Case No. 16. *Snell v. Snell*, 123 Ill. 403.

Facts: Ellen J. Snell, wife of Philip Snell, joined with him in a deed of mortgage to Jane Snell, to waive and release her right of homestead and dower. The mortgage misdescribed the land. Later the mortgagee, Jane Snell, filed a bill to correct and foreclose the mortgage. The present suit is by Ellen J. Snell as widow of Philip Snell, and her two minor children, for assignment of homestead, claiming that no interest therein passed by the deed of mortgage.

Point Involved: Generally, what was the effect of a married woman's contract at common law? by the statutes of Illinois?

MRS. JUSTICE MULKEY: " * * * Coming now to the merits of the case, it may somewhat aid us to advert hastily, and in a general way, to the legal disabilities of married women, as they existed here and in England before the commencement of the reform legislation which has resulted in so radical a change in the present law on the subject. Their contracts, by the common law, as it existed in England, and in this State prior to the comparatively recent legislation on the subject, commencing in 1861, were absolutely void at law, and were equally so in equity, so far as imposing any personal obligation is concerned. They might, however, by such contracts, subject to certain limitations, bind their separate estate, but they imposed no personal obligation whatever. The right of a married woman to have a separate estate in

personal property was purely a creature of equity, and the power to bind it (the estate, not herself), by a contract fairly entered into in respect to the estate, and on her own account, was regarded as a mere incident of such ownership. As her contract imposed on her no personal obligation, either at law or in equity, it therefore followed, as a logical result and legal sequence, that a bill would not lie to reform a contract or conveyance alleged to have been made by a married woman. As a conveyance of land by deed was a species of contract, it followed that an instrument executed by a married woman, purporting to convey real property, was absolutely void, both at law and in equity, and consequently could not be enforced or reformed. While at common law a married woman could not convey her own real estate, or release her inchoate right of dower or other interest in the lands of her husband, yet she might, through the instrumentality of a fictitious suit, called a *fine* or *fine and recovery*, permit another to recover whatever right she had in the land proposed to be conveyed, and thus, by a species of *estoppel*, bar her rights. At common law this was the only mode by which a married woman could dispose of her own lands, or any interest she might have in those of her husband. This cumbrous and expensive mode of conveying her interests in real property was abolished by an act of the British Parliament (3 and 4 William IV, chap. 74), under the provisions of which the wife was enabled to accomplish the same ends as she has been able to do here from a very early period, by joining her husband in an ordinary deed of conveyance, subject to certain prescribed formalities, which, in all cases, had to be strictly complied with. But these statutory enactments, which enabled a married woman to make a valid transfer or conveyance of real property, did not at all affect her disabilities in other respects. As to her, the deed only operated as a conveyance; therefore, all covenants contained in it were, in law, the covenants of the husband only. It followed, that if her deed was not sufficient, on

its face, to pass her property, there was no relief but to induce her to make another; and if she declined to do so, equity would not compel her, nor would it reform the instrument, for such a suit could not, in any case, be maintained for either purpose, except upon the theory that a contract for a deed had existed between the parties. This, of course, could not be done in the case of a married woman, for the simple reason she could not make such a contract, nor, indeed, any at all; and of this the court would take judicial notice. * * *

The law, however, in respect to the right and disabilities of married women, has of late years undergone a radical change. By the acts of 1861, 1869 and 1874, (married women are to-day, and were at the time of the execution of the mortgages in question, placed upon a common footing with married men in respect to all property rights, including the means to acquire, protect and dispose of the same.) They may own, buy, sell, transfer and convey any and all kinds of property, to the same extent as married men or single women may, and subject to no other or different conditions or restrictions. Not only so, but (their duties and obligations in respect to these rights and powers are the same as those of others *sui juris*.) Like other persons, they must perform their contracts; and if they fail to do so, they are amenable to legal process to the same extent as if they were unmarried. If, in the execution of a deed by a married woman a mistake occurs, so that it does not truly state the contract between the parties, a court of equity will correct it against her, just as readily as it would against any other person. * * *

Question 16: What was the power of a married woman to contract at common law? in modern law?

Sec. 12. Aliens.

(Note: Alien friends may freely contract with the citizens of our country, and acquire personal property. Their power to hold real estate in this country depends on the state laws. At common law they could hold no such estate.

An alien enemy cannot make a commercial contract and all such as exist when hostilities are declared, are dissolved.)

Sec. 13. Corporations, Partnerships, Agents, Etc.

(Note: See under appropriate Divisions, *post.*)

CHAPTER THREE

OFFER AND ACCEPTANCE

- A. What, in form, constitutes offer and acceptance.
- B. The validity of the assent in form constituting an offer and acceptance.

A. What, in Form, Constitutes an Offer and Acceptance.

- (a) Offer and acceptance necessary to contract.
- (b) What constitutes offer; and the term thereof.
- (c) What constitutes acceptance.

(a) Offer and Acceptance Necessary to Contract.

Sec. 14. No Contract in Fact Without Offer and Acceptance.

Case No. 17. Bartholomew v. Jackson, 20 Johns., 28.
Facts: J owned a stubblefield in which B had a stack of wheat. J sent word to B to remove the wheat, as he wished to burn the stubble. B was not at home, but B's sons stated that the wheat would be removed by 10 o'clock the next morning. J waited until that time, and, expecting B to appear and remove the wheat, set fire to a remote part of the field. The fire spread rapidly and threatened the wheat, whereupon J to save it, removed it. He then sued for his labor and had judgment, but B appealed to the present court.

Point Involved: If one person does work for another without the knowledge or consent of that other, is there a contract?

PRATT, J.: “* * * The plaintiff performed the service with out privity or request of the defendant, and there was in fact no promise, expressed or implied. If a man humanely bestows his labor, and even risks his life in voluntarily aiding to preserve his neighbor’s house from destruction by fire, the law considers the service rendered as gratuitous and it therefore forms no ground of action. The judgment must be reversed.”

Question 17: State the facts in the above case, the question involved and the court’s decision.

Case No. 18. Broadax v. Ledbetter, 100 Texas, 375.

Facts: Plaintiff sued upon a claim for a reward offered by defendant, alleging that defendant was a sheriff and as such had in his custody one Vann, convicted of murder and condemned to death; that Vann, pending his appeal to the higher Court, had broken jail and escaped. That defendant offered a public reward for his recapture; that the plaintiff made the recapture and thus earned the reward. Defendant objected that plaintiff did not state that he had knowledge of the offer of reward when he made the capture. The court gave plaintiff leave to amend, but the plaintiff declined to do so and appealed, standing upon the sufficiency of his claim without such averment.

Point Involved: If an offer is made, and the person to whom such offer was addressed, without knowledge of the offer, does the thing called for by the offer, is there a contract?

WILLIAMS, J.: “* * * The liability for a reward of this kind must be created, if at all, by contract. There is no rule of law which imposes it except that which enforces contracts voluntarily entered into. A mere offer or promise to pay does not give rise to a contract. That requires the assent or the meeting of two minds, and therefore is not complete until the offer is accepted. Such an offer as that alleged may be accepted by anyone who performs the service called for when the ac-

ceptor knows that it has been made and acts in performance of it, but not otherwise. He may do such things as are specified in the offer, but, in so doing, does not act in performance of it, and therefore does not accept it, when he is ignorant of its having been made. There is no such mutual agreement of minds as is essential to a contract. The offer is made to any one who will accept it by performing the specified acts, and it only becomes binding when another mind has embraced and accepted it. The mere doing of the specified things without reference to the offer is not the consideration for which it calls. This is the theory of the authorities which we regard as sound. * * *

Question 18: (1.) State the facts in the above case, the question presented and the court's decision.

(2.) A and B discuss the sale of a horse from A to B. No bargain is struck. A then leaves town and from a distance mails B a letter offering the horse for sale for \$100. Before B gets this letter he writes A he will buy the horse on the identical terms that are proposed in A's letter, though he does not yet know that letter has been written. The two letters cross in the mails. Is there a contract? Why? *No offer + acceptance*

(b) What Constitutes Offer; and the Term Thereof.

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| § 15. Intention to make offer. | § 19. Notice of withdrawal necessary. |
| § 16. Certainty of offer. | |
| § 17. Lapse of offer by expiration of time. | § 20. Rejection of offer as terminating it. |
| § 18. Withdrawal of offer before acceptance. | § 21. Lapse of offer by death or insanity of the offeror. |

Sec. 15. Propositions Not Intended as Offers.

Case No. 19. Keller v. Holderman, 11 Mich. 248.

Facts: Plaintiff sued on a check for \$300.00. The defendant had, in a spirit of jest, given the check for an old watch worth \$15, and both parties knew the entire transaction was a joke, and that no sale was intended.

MARTIN, C. J.: "When the Court below found as a fact 'that the whole transaction between the parties was a frolic and a banter, the plaintiff not expecting to sell

nor the defendant intending to buy the watch, at the sum for which the check was drawn,' the conclusion should have been that no contract was ever made by the parties. * * * X X

Question 19: (1.) Suppose the promisee had not known that the promisor was joking. Could the promise be enforced? Plate 7 v. Durst, 42 W. Va. 63.

Case No. 19a. Anderson v. Wisconsin Rwy. (Remarks of Elliot, J., p. 518, *post.*)

Question 19a: (1.) A merchant advertizes a bargain sale at a certain time quoting articles and prices. B, at some expense, attends. The sale is not held. B demands certain of the articles at the prices quoted. Is there a contract? Has B any action for damages? *See*

(2.) A, a salt dealer, sends to all his old customers a printed circular letter "offering" a certain grade of salt at certain prices and requesting orders. B, in response, orders a reasonable quantity. Can B hold A on the order? Why?

Sec. 16. The Proposition to Constitute an Offer Must Be of Reasonable Certainty.

Case No. 20. Sherman v. Kitsmiller, Adm'r., 17 S. & R. (Pa.) 45.

Facts: Elizabeth Sherman, nee Koons, lived as house-keeper for the deceased until her marriage, upon his promise to convey her 100 acres of land for her services. No particular 100 acres were stated. This is a suit against the administrator for the enforcement of the alleged contract.

DUNCAN, JUSTICE: " * * * Express promises * * * ought to be explicit, to a common intent at least. * * *

" * * * In the present case * * * the promisor himself would not know what to convey, nor the promisee what to demand. If it had been a promise to give her 100 pieces of silver, this would be too vague * * *; for what pieces? * * *—what denomina-

xx "a joking promise would not be an element of a contract, because such an agreement is not enforceable at law." *M. Am. Law.* p 377

tion? One hundred cows would be sufficiently certain, because the intention would be that they should be of middling quality; but 100 acres of land, without locality, without estimation of value, without relation to anything that could render it certain, does appear to me to be the most vague of all promises; and if any contract can be void for its uncertainty this must be. One hundred acres on the Rocky Mountains, or in the Conestoga manor—100 acres in the mountain of Hanover County, Virginia, or in the Conewango rich lands of Adams county—100 acres of George Sherman's mansion place at \$80 per acre, or 100 acres of his barren lands at \$5?

"This vague and void promise, incapable of specific execution * * * would not prevent the plaintiff from recovering * * * for the value of the woman's services until her marriage," (i. e., though the offer of 100 acres of land was too uncertain for its acceptance to constitute a contract, yet for services actually performed, she could recover a reasonable compensation as on an implied offer and acceptance.—Ed.)

Decision of the Court: For defendant, on the express contract as too indefinite; for the plaintiff on an implied contract for services rendered.

Question 20: (1.) State the facts in the above case, the question presented and what the court held.

(2.) What did the court say in reference to a promise to give 100 cows for the services of complainant? Why any distinction in such a case?

(3.) Was the claimant allowed to recover anything for her services? On what theory?

Sec. 17. Lapse by Expiration of Time.

Case No. 21. Maclay v. Harvey, 90 Ill. 525.

Facts: John Harvey, defendant, owner of a millinery store in Monmouth, on March 21, 1876, wrote plaintiff, a milliner in Peoria, Illinois, offering her a position in his shop at \$15 per week during the season, which was

to begin about the 5th to the 10th of April and to end about July 1st. He ended by saying:

“You will confer a favor by giving me your answer by return mail.” Plaintiff on March 23rd answered this letter accepting position, and gave the answer to a boy to post. The postmark showed it was not put in the post-office until March 25th. Defendant not receiving plaintiff’s answer by return mail or several mails thereafter, made other arrangements. Plaintiff sued for breach of contract.

Point Involved: If acceptance to an offer is requested within a certain time, does this limit the life of the offer? x

SCHOFIELD, J.: “* * * If a contract was consummated between the parties, it was by the mailing of appellant’s (plaintiff’s) postal card on the 25th of March. * * * It is clear here that the nature of the business demanded a prompt answer, and the words, ‘You will confer a favor by giving me your answer by return mail,’ do in effect stipulate for answer by return mail. * * * There were two daily mails between Peoria and Monmouth. * * * and it did not require more than one day’s time between the points. Appellee’s (defendant’s) letter * * * bears date March 21st. * * * (Plaintiff) received appellee’s letter on the evening of the 22nd. Appellee was, therefore, entitled to expect a reply mailed on the 23rd, which he ought to have received on that day, or at the farthest, on the morning of the 24th, but appellant’s reply was not mailed until the 25th. It does not relieve appellant of fault that she gave the postal card to a boy on the 23rd to have him mail it. * * * The boy was her agent, * * * and his negligence * * * was her negligence. * * *”

Question 21: State the facts in the above case, the question presented and the court’s decision.

Case No. 22. Hagardine Co. v. Reynolds, 64 Fed. 560.

Facts: Defendant, at New York, offered to sell plaintiff, at St. Louis, a certain quantity of cotton warp. The

offer reached plaintiff September 28, 1892, and the letter of acceptance was mailed by it October 4, 1892. No time was stated in which the acceptance must be made. A considerable correspondence had been carried on by the parties, letters always being answered by both parties within three days. Defendant claims that the offer had expired because a reasonable time had elapsed, under the circumstances, before plaintiff attempted to accept the offer.

Point Involved: If the life of the offer is not expressly limited, what elements enter to determine its length of continuance?

PRIEST, DISTRICT JUDGE: “* * * The defendants insist more strongly that the acceptance was not within a reasonable time, and I am of opinion that this defense is well taken. Up to this time the correspondence had been prompt. Both parties had been ready with and made replies upon receipt of each other’s letters. Never more than three days had intervened between the mailing of a letter and the posting of its reply. The defendants had the right, therefore, to presume, * * * from the unusual delay, that the plaintiff concluded to negative their offer. They would not have been justified in holding goods then ripe for an opening market to await the uncertain action of the plaintiff beyond that time usually and reasonably necessary for the formation and transmission of a rejoinder. * * * What is a reasonable time must be determined by circumstances and situation of both parties. The defendants were not concerned with, nor could they know of, Mr. McKittrick’s absence from business. * * * There are cases and circumstances in which the question of ‘reasonable time’ is one for the determination of a jury but this, in my opinion, is not one of them. * * *”

(See also case 24.)

Question 22: (1.) What were the facts in the above case, the question presented and the court’s decision?

(2.) On Saturday afternoon, P offered D by telegram a large quantity of oil at 58c. The telegram reached D Monday morn-

ing, between 8 and 9 o'clock A. M. On Tuesday about 9 A. M. D deposited a telegram purporting to accept the offer, which reached P in due time. The market on oil was very unsettled, and the price had for a month previous been subject to great and sudden fluctuations, ranging from 55c to 75c per gallon. P refuses to fill the order and promptly notifies D to this effect. Can D hold P? (Minnesota Oil Co. v. Collier & Co., 4 Dillon (U. S. Circuit Court) 431.)

Sec. 18. Withdrawal of Offer Before Acceptance.

Case No. 23. Bosshardt Co. v. Oil Co., 171 Pa. St. 109.

Facts: The Oil Co. on July 31, 1893, made a written offer to supply oil, ending as follows:

“We extend to you a refusal of making the contract on the above basis for the term of sixty days from this date.

* * * ” On Sept. 25, 1893, the Oil Co. wrote:

“We wish to advise you that we withdraw our offer of July 31st. * * * You will therefore consider the same cancelled.”

Point Involved: May an offer be withdrawn before the period of its expiration by mere lapse of time? Does an express promise to keep it open a certain length of time bind the offeror to keep it open for such time?

MR. JUSTICE MCCOLLUM: “* * * There being no consideration for the offer in this case, the defendant had a clear right to withdraw it at any time before there was an acceptance of it. * * *”

Question 23: (1.) State the facts in the above case, the question presented and the court's decision.

(2.) Why has one a legal right to break his promise to keep an offer open?

(3.) Suppose, in the case stated, the offeree had paid the sum of \$10.00 to the offeror as a consideration for keeping the offer open for 60 days. Could it then have been withdrawn?

Sec. 19. Notice of Withdrawal Necessary.

Case No. 24. Kempner v. Kohn, 47 Ark. 519.

Facts: The facts are as follows: Jan. 30, 1885, P, at Little Rock, offered his lot to D at Hot Springs. Feb. 7,

1885, D wrote accepting offer on terms proposed. February 7, 1885, P wrote withdrawing his offer. February 9, 1885, P received D's acceptance. Assume P's revocation was placed in postoffice prior to D's letter of acceptance.

Point Involved: Where an attempted revocation of an offer is made, must the knowledge of such revocation actually reach the offeree before his acceptance? Incidentally, when is an acceptance complete?

SMITH, J.: “* * * The defendant, having caused the question to be submitted to the jury, under an instruction drawn by his counsel, and having met with an adverse decision, now asks us to declare as a matter of law, that Kohn's acceptance was unreasonably delayed. But we think the question was properly resolved in favor of the plaintiff. (The subject of negotiation was real estate, which requires more deliberation than if it had been a transaction in cotton or other particle of merchandise. It is also less subject to sudden and violent fluctuations in price. Five days was not an unreasonable time. * * *

“Then as to the attempted retraction: An offer made by letter which is to be answered in that way, cannot be withdrawn unless the withdrawal reaches the party to whom it is addressed before he has accepted. * * * The acceptance was effectual to complete the contract notwithstanding Kempner had previously mailed a letter to Kohn announcing the retraction of the offer.”

Question 24: State the facts in the above case, the question presented and the court's decision.

Sec. 20. Rejection of Offer as Terminating It.

Case No. 25. Fox v. Turner, 1 Ill. App. 153.

Point Involved: Does a rejection of an offer terminate it? Is a counter offer a rejection?

BAILEY, J.: “* * * (An acceptance, to be good, must in every respect meet and correspond with the offer,

neither falling within, nor going beyond, the terms proposed, but exactly meeting them at all points, and closing with them just as they stand. *Potts v. Whitehead*, 23 New Jersey Eq. 572. But a proposal to accept, or an acceptance of an offer, on terms varying from those proposed, amounts to a rejection of the offer and a substitution in its place of a counter proposition, which cannot become a contract until assented to by the first proposer.) It is equivalent to saying, "I am not satisfied with your proposition but I will take it and make certain modifications in it, and submit it to you, as a proposition of my own for your acceptance." The original offer thereby loses its vitality, being, so to speak, passed by in the negotiation, so as to be no longer pending between the parties, and it becomes an open proposition again only when renewed by the party who first made it. Hence (a party who has submitted a counter proposition, cannot without the assent of the other party, withdraw or abandon the same and then accept the original offer which he has virtually rejected.) * * * (Citing cases.)

Question 25: State the question involved in the above case and the answer thereto.

Sec. 21. Lapse of Offer by Death or Insanity of Offeror.

Case No. 26. *Beach v. M. E. Church*, 96 Ill. 177.

Facts: Lorenzo Beach in February, 1874, signed the following paper:

"Fairbury, February 14, 1874.

"We, the undersigned, agree to pay the sum set opposite our respective names, for the purpose of erecting a new M. E. church in this place, said sums to be paid as follows: One-third to be paid when contract is let, one-third when building is enclosed, one-third when building is completed. Probable cost of said church from ten thousand dollars (\$10,000) to twelve thousand dollars (\$12,000)."

*Partie
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To which he attached and subscribed the following:

“Fairbury, 1874.

“Dr. Beach gives this subscription on the condition that the remainder of eight thousand dollars is subscribed.

“Lorenzo Beach\$2,000.”

Beach was adjudged insane and conservators appointed in April, 1875; other subscriptions to the amount of \$8,000.00 were received and the building begun in September, 1876; in 1878 Beach died. This suit was begun shortly before Beach's death against his conservators; dying before trial, his heirs were made parties.

Point Involved: If, after an offer is made, and before its acceptance, the offeror becomes insane, or dies, does the offer thereby lapse? Incidentally, what is the nature of a charitable subscription to pay money?

MR. CHIEF JUSTICE DICKEY: “* * * There is nothing in the record tending to show that the church, in this case, took any action, upon the faith of the subscription, until after Dr. Beach was adjudged insane, or that the church paid money, or incurred any liability. { His insanity, by operation of law, was a revocation of the offer. } In Pratt, Administratrix, etc., v. The Trustees of the Baptist Society of Elgin, 93 Ill. 475, this court said, in relation to such a subscription:

{ “ ‘The promise, in such case, stands as a mere offer, and may, by necessary implication, be revoked at any time before it is acted upon. It is the expending of money, etc.,
(2) or incurring of legal liability on the faith of a promise (of this kind) which gives the right of action. } * * *
Until acted upon, there is no mutuality, and, being only an offer, and susceptible of revocation at any time before being acted upon, it follows that { the death of the promisor, before the offer is acted upon, is a revocation of the offer. } * * * The continuance of an offer is in the nature of its repetition, which, of course, necessarily requires some one capable of making a repetition. Obviously, this can no more be done by a dead man than a contract can, in the first instance, be made by a dead man.’

“Conservators of the person and property of an insane man may perform personal contracts of their ward legally subsisting, under some circumstances; but in this case there was no contract between Dr. Beach and the church. (The paper signed by Dr. Beach was of such a nature that no binding contract sprung therefrom until the church had accepted the same by incurring some legal liability, or expending money upon the faith of it.) There being no binding contract upon Dr. Beach at the time that his conservators made the payments, they had no lawful authority to make the same, and the estate of Dr. Beach was not bound thereby.”

Question 26: (1.) What is the reason given by the court that death or insanity should terminate a continuing, unaccepted offer?

(2.) Why was there no contract in this case prior to Dr. Beach's insanity?

(Note: Charitable subscriptions are unenforceable until acted upon, because they are not upon consideration, that is, the promisee has made no corresponding enforceable promise to do anything and has sustained no detriment. This is generally conceded. (If, however, the subscription is acted upon by the promisee, the subscription thereupon becomes binding.) This, also, is the law everywhere. If there are promises by several subscribers made mutually dependent, some courts enforce them. See exhaustive note on this subject in 48 Lawyers' Reports Annotated, N. S., p. 783.)

(c) What Constitutes Acceptance.

§ 22. It completes the contract.

§ 24. Acceptance may be shown by conduct.

§ 23. It must be in the terms of the offer.

§ 25. When acceptance complete.

Sec. 22. Acceptance Completes the Contract.

(Note: Whenever is given that which constitutes an acceptance to an existing proposition so stated and made that it legally constitutes an offer, the contract is complete. The contractual tie has been formed. Neither party can withdraw without the other's consent; neither party can insist upon modifications.

An offer unaccepted is withdrawable before acceptance; an

acceptance completes the contract. For this reason, when counter propositions are made it may become very important to determine which proposition constitutes the offer and which the acceptance.)

Sec. 23. The Acceptance Must Be in the Terms of the Offer.

Case No. 27. Four Oil Co. v. United Oil Producers, 145 Cal. 623.

Facts: Suit to recover for breach of alleged contract to buy oil. The evidence showed an offer to sell petroleum of a 'guaranteed gravity of not less than 15 degrees Beaume,' and a reply to that offer stating, 'but we wish this distinctly understood under this agreement to be 15 degrees Beaume *at a temperature of 60 degrees Fahrenheit.*'

Point Involved: If the offeree responds upon terms and conditions not stated in the offer, is the response an acceptance of such offer?

HINSHAW, J., delivered the opinion of the court:
 " * * * [An offer imposes no obligation unless it is accepted upon the terms upon which it was made.]
 * * * A qualified acceptance is a new proposal.]
 * * * Under these principles of law it is clear * * * that the minds of the parties had not met in the creation of a legal obligation, and for the reason that the acceptance of the defendant was conditional and imported into the contract a term not found in the original proposal, and one requiring the assent of the plaintiff before either could be bound."

Question 27: (1.) State the facts in the above case, the question presented and the court's decision thereupon.

(2.) A wrote B offering B a certain price for his old corn and a certain price for his new corn. B replied accepting as to the new corn. Is there a contract? (Miller v. Sharp, 100 N. E. 108.)

(3.) A offered a reward for the apprehension and evidence leading to B's conviction. C, after B's apprehension by another, furnished the information upon which B was convicted. Is he

entitled to the reward? *Fitch v. Snedaker*, 38 N. Y. 248; *Williams v. R'w'y*, 191 Ill. 610.

Sec. 24. Acceptance May Be Shown by Conduct.

Case No. 28. *Hobbs v. Massasoit Whip Company*, 158 Mass. 194.

Facts: Plaintiff, Hobbs, had sent eel skins to the defendant, on several different occasions, and had been paid for them. He then sent the eel skins in question, and received no reply from the Company which kept them for several months till they became worthless. Plaintiff then sued for the price. The defendant claims there was no contract and that having no contract with the plaintiff it was under no duty to go to the expense and trouble of notifying him of the rejection of skins which it had never ordered and did not want or make use of. Plaintiff claims that owing to his prior relations with the defendant, the defendant was under obligations to notify him of its rejection and that its failure so to do was evidence of its acceptance from which a jury might properly find a contract.

Point Involved: May silence by an offeree who is in receipt of goods from the offeror, be considered as an acceptance of the offer if the prior dealings of the parties have been such that the offeror is justified in believing that he will be notified if there is a rejection of his offer?

HOLMES, J.: "This is an action for the price of eel skins sent by the plaintiff to the defendant, and kept by the defendant some months, until they were destroyed. It must be taken that the plaintiff received no notice that the defendant declined to accept the skins. The case comes before us on exceptions to an instruction to the jury, that, whether there was any prior contract or not, if the skins are sent to the defendant, and it sees fit, whether it has agreed to take them or not, to lie back, and to say nothing, having reason to suppose that the man who has sent them believes that it is taking them, since it says

nothing about it, then, if it fails to notify, the jury would be warranted in finding for the plaintiff.

“Standing alone, and unexplained, this proposition might seem to imply that one stranger may impose a duty upon another, and make him a purchaser, in spite of himself, by sending goods to him, unless he will take the trouble, and be at the expense, of notifying the sender that he will not buy. The case was argued for the defendant on that interpretation. But, in view of the evidence, we do not understand that to have been the meaning of the judge, and we do not think that the jury can have understood that to have been his meaning. The plaintiff was not a stranger to the defendant, even if there was no contract between them. He had sent eel skins in the same way four or five times before, and they had been accepted and paid for. On the defendant’s testimony, it is fair to assume that, if it had admitted the eel skins to be over twenty-two inches in length, and fit for its business, as the plaintiff testified, and the jury found that they were, it would have accepted them; that this was understood by the plaintiff; and, indeed, that there was a standing offer to him for such skins. In such a condition of things, the plaintiff was warranted in sending the defendant skins conforming to the requirements, and even if the offer was not such that the contract was made as soon as skins corresponding to its terms were sent, sending them did impose on the defendant a duty to act about them; and silence on its part, coupled with a retention of the skins for an unreasonable time, might be found by the jury to warrant the plaintiff in assuming that they were accepted, and thus to amount to an acceptance. See *Bushnell v. Wheeler*, 15 Q. B. 442; *Benjamin on Sales*, 162, 164; *Taylor v. Dexter Engine Co.*, 146 Mass. 613, 615. The proposition stands on the general principle that conduct which imports acceptance or assent is acceptance or assent in the view of the law, whatever may have been the actual state of mind of the party—a principle sometimes lost sight of in the cases. * * *

Question 28: (1.) State the facts in the above case, the question involved and the court's decision.

(2.) Did the court hold as a matter of law that there was a contract in this case? What did it hold?

(3.) A subscribes for the B magazine. His subscription expires but the magazine continues to come. It is received by A for another year. Is he liable for this additional year?

Sec. 25. When Acceptance Complete; Contract by Mail or Telegraph.

Case No. 29. Lucas v. W. U. Tel. Co., 131 Iowa Reports, 669.

Facts: Lucas on the evening of Nov. 11, 1912, received a letter from one Sas offering to exchange real estate and stating: "I will have to know at once as I have another deal pending." Lucas replied by telegram at 9:10 A. M. the following day. The telegraph company did not send the message until 4:41 P. M. and Sas received reply at 6.03 P. M. Sas had sold the property at 3:30 P. M. to another party and wrote that, not hearing from Lucas, he had decided Lucas did not want the property. Lucas sued the telegraph company for loss of the contract by its negligent delay. The trial court held that by the negotiations a contract had resulted notwithstanding the delay and therefore Lucas had no case against the telegraph company, but should pursue his action against Sas for breach of contract. Lucas appeals.

Points Involved: If an offeror in making an offer to one at a distance authorizes the use of a certain agency for transmission of the reply and such agency is made use of, when is the acceptance complete? if another means of transmission than the one authorized is used by the offeree, when is the acceptance complete? (1) Does the use of a particular agency of transmission by the offeror impliedly direct its use by the offeree? (2)

LADD, J.: "The proposition of an exchange was made to plaintiff by letter. In committing it, properly addressed to the mails for transmission, the postoffice became the agent of Sas to carry the offer, he taking the

- (1) When the acceptance is delivered to the same agency.
- (2) When the acceptance reaches the offeror.
- (3) Yes, in the absence of other instructions.

chances of delays in the transmission. * * * Having sent the proposition by mail he impliedly authorized its acceptance through the same agency. Such implication (2) arises (1) when the post is used to make the offer and no other mode is suggested, and (2) when the circumstances are such that it must have been within the contemplation of the parties that the post would be used in making the answer. * * * The contract is complete in such a case when the letter containing the acceptance is properly addressed and deposited in the United States mails. * * * This is on the ground that the offeror, by depositing this letter in the post-office, selects a common agency through which to conduct the negotiations, and the delivery of the letter to it is in effect a delivery to the offeror. Thereafter the acceptor has no right to the letter, and cannot withdraw it from the mails. Even if he should succeed in doing so the withdrawal will not invalidate the contract previously entered into. But the plaintiff did not adopt this course. On the contrary, he chose to indicate his acceptance by transmitting a telegram to Sas by the defendant company. Sas had done nothing to indicate his willingness to adopt such agency and the defendant, in undertaking to transmit the message, was acting solely as the agent of the plaintiff. The latter might have withdrawn the message or stopped its delivery at any time before it actually reached Sas. [It is manifest that handing the message to his own agent was not notice to the sendee of (5) the telegram. The most formal declaration of an intention of acceptance of an offer to a third person will not constitute a contract. } A written letter or telegram, like an oral acceptance, must be communicated to the party who had made the offer, or to someone expressly or impliedly authorized to receive it } and this rule is not complied with by delivering it to the writer's own agent or messenger even with direction to deliver to the offeror. * * *

“The party making the offer may be entirely satisfied to trust the mails, and not be willing to chance the use of

the telegraph. * * * It is very evident on authority and principle that, in the absence of any suggestion, one transmitting an offer by mail cannot be bound by an acceptance returned in some other way until it is received or he has notice thereof. The plaintiff, then, did not accept the offer of Sas until the telegram was received by the latter, a few minutes after 6 o'clock P. M. of the day after the letter had been received, and the question arises whether this was 'at once' within the meaning of the offer which stated that another deal was pending. Like 'forthwith' and 'immediately,' 'at once' does not mean instantaneously, but requires action to be taken within a reasonable time. * * * It is doubtful whether the same vigilance should be exacted in the acceptance of an offer to exchange or purchase real estate as in transactions relating to the transfer of chattel property. See *Kemper v. Cohn*, 47 Ark. 519, 58 Am. Rep. 775, S. W. 869. The circumstances of each case necessarily have an important bearing. There was no evidence of the time a letter, if promptly mailed, might have reached Sas. He has indicated in his letter that he was contemplating another deal, and we think ordinary minds fairly differ as to whether, in these circumstances, an acceptance twenty-three or twenty-four hours after the letter had been received was in time to bind the party making the offer, and the issue was for the jury to determine."

Question 29: (1.) State the question presented in the above case and the court's decision.

(2.) What two criteria are named by the court as denoting the means by which the offeror intends his offer to be accepted?

(3.) If an acceptance is sent in any other manner than that authorized by the offeror, when is, if ever, the offer complete?

(4.) A wired an offer to sell oil to B. The telegram was sent at 9 A. M. and received by B in due course at 11:15 A. M. B wired his acceptance at 12:45 P. M., and it reached A in due course at 4:15 P. M. At 2 P. M. of the same day A had wired a revocation of his offer, which reached B at 3 P. M. Was there a contract? If so, at what time? *Contract existed at 12:45 P.M.*

(5.) H wrote the X corporation, asking that certain shares

be allotted to him and offering to pay a certain price therefor. The directors of the X Co. instructed their agent through the mail to allot 11 such shares, and the shares were registered as H's. On these facts is there a contract? (Hebb's Case L. R. 4 Eq. 9.)

(6.) A, from Peoria, Illinois, calls on B at his office in Chicago. B offers A an automobile for \$500. A desires time to consider, and B says, "Think it over and let me know within 3 days." B knows that A comes from out of town and is going back home that day. A, on reaching Peoria, within 3 days mails B his acceptance. The letter is lost and never reaches A. Is there a contract?

(Note: See also, on this question, *Adams v. Lindsell*, 1 B. & Ald. (Eng.) 681; *Trevor v. Wood*, 36 N. Y. 307; *Household Ins. Co. v. Grant*, 41 L. T. N. S. 298.)

B. The Validity of the Assent Contained in the Offer and Acceptance.

◁ (Note: Having now seen what constitutes offer and acceptance, and assuming that words have been spoken or acts done which constitute *in form* an offer and an acceptance, yet we may find, by evidence *aliunde* that a binding contract does not exist. There may be extrinsic circumstances of mistake, fraud, undue influence, etc., that impair the validity of the assent that has in form been given.) >

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|---|---|
| (a) Mistake preventing formation of contract. | (c) Fraud, misrepresentation, duress and undue influence making contract voidable (not void). |
| (b) Fraud preventing formation of contract. | |

(a) Mistake Preventing Formation of Contract.

§ 26. Mutual mistake as to existence or identity of subject matter, etc.

§ 27. Mutual mistake as to value, quality, etc.

Sec. 26. Mutual Mistake as to Existence or Identity of Subject Matter or Identity of Terms Used.

Case No. 30. *Riegel v. Amer. Life Ins. Co.*, 153 Pa. 134.

Facts: One L had an insurance policy on his life in the A. L. Ins. Co. in favor of R, his creditor. L disappeared and R kept up the premiums. Finally, finding the matter burdensome, R surrendered the policy to the insurance company and took out a paid-up policy in a much less sum in return therefor. As a matter of fact, L was dead at the time of the agreement. Both parties had acted on the assumption that he was alive. This is a suit brought to have that settlement set aside and give R the full benefit of the former policy.

Point Involved: If an agreement is made based on a mutual mistake as to the condition or existence of the subject matter, does a contract result?

MR. JUSTICE STERRETT: “* * * < The general rule is that an act done or a contract made, under a mistake of a material fact is voidable and relievable in equity. > The fact of course must be material to the act or contract. * * *. The principle is illustrated by familiar examples, employed by text writers, thus: A agrees to buy a certain horse from B. It turns out that the horse is dead at the time of the bargain, though neither party is then aware of the fact. The agreement is void.

“A agrees to buy a house belonging to B. The house was previously destroyed by fire, but the parties dealt in ignorance of the fact. The contract, not being for the sale of the land on which the house stood, was not enforceable.

“It cannot be doubted that in exchanging the old for the new policy both parties acted on the basis that Leisenring was then alive. * * *

“* * * And it is now adjudged and decreed that the contract under which said exchange of insurance policies was made be rescinded, that the paid-up policy for \$2,500 be surrendered and cancelled, and that the original policy of insurance be reinstated, as of the date of its surrender; and that the defendant company pay to the plaintiff the sum of \$6,000. * * *”

Question 30: State the facts in the above case, the question presented and the court's decision.

The above is a case in equity

Case No. 31. Indiana Fuel Supply Co. v. Indianapolis Basket Co., 84 Northeastern Reporter (Ind.) 776.

Facts: “* * * This action was brought by appellant before a magistrate to recover the contract price of coal, the appellee contending as a defense, among other things, (1) that because of a misunderstanding between the buyer and the seller as to the grade of coal the contract called for, the buyer having in mind Indiana domestic egg coal, double screened, and the seller having in mind Indiana steam egg coal, screened but once, that the minds of the contracting parties never met and that there was therefore no contract between them;
* * *

RABB, JUSTICE: <“Mutual assent is necessary to the formation of every contract, and any mistake of the parties by which one of the contracting parties has in mind one thing as the subject matter of the contract, and the other party has in mind something entirely different, and where the terms of the contract are such that it will mean either the one or the other, there is no meeting of the minds of the contracting parties, and therefore no contract.> If in this case the terms of the contract entered into by the parties would properly describe domestic egg coal, and could be understood by either of the parties as meaning domestic egg coal, and would also describe steam egg coal, and could be understood by either of the parties as meaning steam egg coal, and if one of them had in mind when he contracted for egg coal the higher grade of coal, and the other had in mind when entering into the contract the lower grade of coal, and each party believed that by the terms of the contract he was contracting for the particular kind of coal he had in mind, then no contract was entered into between the parties. 24 A. & E. Ency. of Law, P. 1034, and cases cited.”*

(Note: See also Case No. 256, as to Mistake as to Price.)

Suit of Law, not Equity

*Both parties must have been mistaken to make contract void

Question 31: (1.) State the facts in the above case, the question presented and the court's decision.

(2.) Two ships Peerless sail out of Bombay with similar cargoes. A sells B the cargo on the ship Peerless out of Bombay. A means a certain one of the ships, but B has in mind the other. ** Is there a contract? *Raffles v. Wichelhouse*, 2 H. & C. 906.

Sec. 27. Mutual Mistake as to Collateral Matters of Value, Quality, Etc.

Case No. 32. *Wood v. Boynton*, 64 Wis. 265.

Facts: Wood found a small uncut diamond worth \$700 to \$1,000. Thinking it was a topaz she sold it for \$1.00 to Boynton, who also thought it was a topaz and was ignorant of its true character. When Wood discovered that the stone was in fact a diamond she tendered back the \$1.00 with interest and demanded possession. Boynton refused, and Wood brought suit.

Question: If there is a *mutual* mistake as to the quality and value of the subject matter of an agreement, does such mistake affect the validity of the contract?

TAYLOR, J.: “* * * There is no pretense as to mistake in the identity of the thing sold. It was * * * exhibited to the vendee before the sale was made, and the thing sold was delivered to the vendee when the purchase price was paid. * * * < When this sale was made the value of the thing sold was open to the investigation of both parties; neither knew its extrinsic value, and, so far as the evidence in this case shows, both supposed that the price paid was adequate.> * * *”
(Judgment for defendant)

Question 32: State the facts in the above case, the question presented and the court's decision.

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(b) Fraud Preventing Formation of Contract. (Fraud Consisting in Trickery as to the Very Nature of the Act Done.)

Sec. 28. This Fraud Defined; Elements Thereof.

** “There is no contract unless the parties so agree to the same thing and in the same sense”
McAm. Law, p. 377.

Case No. 33. I. D. & W. R. Co. v. Fowler, 201 Ill. 152.

Facts: Fowler, the plaintiff, who sues for damages for personal injuries, was a passenger on one of defendant's trains, going from Willow Hill to Ste. Marie. During the journey a bridge gave way and he was injured. Nine days later, while Fowler was still suffering from the injuries received, the company's superintendent, lawyer, and physician, called at his home and secured his mark as a signature to a paper purporting to be a release of all claims for damages for the personal injuries received on account of the wreck, with a receipt for \$35.00 subjoined. This release is interposed as a defense to the present suit. Fowler claims he did not know what he was signing and that his signature was obtained by fraudulent assertions as to the character of the paper. The jury found for plaintiff and the defendant appeals.

Point Involved: That<a release secured by fraud as to its legal character is not binding>

MR. JUSTICE CARTER: “* * * The question whether the release was executed by appellee with full knowledge of its purport and under circumstances that would bind him is one of fact, and has been settled by the jury * * *. If the release was obtained by fraud [as to the character of the paper signed] it was absolutely void. It never had any binding force. * * *”

Question 33: State the facts in this case and the point involved.

(Note: Where an instrument *negotiable in form* is secured by fraud of this character, and is sold to an *innocent party*, other questions arise. See also Case No. 484.)

(c) Fraud, Misrepresentation, Duress and Undue Influence Making Contract Voidable (Not Void).

§ 29. The elements in fraud.

§ 30. Silence and concealment as fraud.

§ 31. Duress.

§ 32. Undue influence.

§ 33. Conditions of disaffirmance.

Sec. 29. The Elements in Fraud.

(Note: To constitute fraud there must be:

- (1.) A false representation; } *or concealment of a material fact*
- (2.) Of a material fact; }
- (3.) Known to be false or carelessly made without regard to truth;
- (4.) With intent to deceive;
- (5.) Relied upon;
- (6.) To promisee's damage.)

Case No. 34. Nat. Cash Reg. Co. v. Townsend, 137 N. C. 652.

Facts: Plaintiff Townsend bought a cash register on the statement that its use would save the expense of a bookkeeper and a half of a clerk's time. He now alleges that these assertions are false and seeks to rescind the sale on the ground of fraud.

Point Involved: Is a statement of an opinion or a commendation a fraudulent representation? Generally, what constitutes fraud?

BROWN, J.: “* * * The material elements of fraud, as laid down by the text writers, are, first, misrepresentation or concealment; second, an intention to deceive, or negligence in uttering falsehoods with intent to influence the actions of others; and third, the success of the deceit in influencing the action of the other party. To constitute legal fraud which will warrant the rescission of a contract, there must be a false representation of a material fact. (There are cases in the books where courts of equity have afforded relief from the consequences of innocent misrepresentation. Contracts induced thereby have in some instances, and under peculiar circumstances, been set aside; but in all the cases the misrepresentation was of a material and subsisting fact.) No particular rule can be laid down as to what false representation will constitute fraud, as this must necessarily depend upon the facts of each case, the rel-

ative situation of the parties, and their means of information. But all the authorities are to the effect that <where the false representation is an expression of commendation, or is simply a matter of opinion, the courts will not interfere to correct errors of judgment.> Walsh v. Hall, 66 N. C. 236. The law will not give relief unless the misrepresentation be of a subsisting fact. Hill v. Gettys, 135 N. C. 375, 47 S. E. 449. What has been called 'promissory representation,' looking to the future, as to what the vendee can do with the property, how much he can make on it, and, in this case, how much he can save by the use of it, are on a par with false affirmations and opinions as to the value of property, and do not generally constitute legal fraud. Benjamin, Sales, 7th ed. 483 et seq., Gordon v. Parmelee, 2 Allen, 212; Long v. Woodman, 58 Me. 52, and cases cited. Mr. Clark, in his work on Contracts, states, in substance, that commendatory expressions or exaggerated statements as to value or prospects, or the like, as where a seller puffs up the value and quality of his goods, or holds out flattering prospects of gain, are not regarded as fraudulent in law. Pp. 332-334. <It is the duty of the purchaser to investigate the value of such expressions of commendation. He cannot safely rely upon them.> If he does he cannot treat it as fraud, either for the purpose of maintaining a deceit, or for the purpose of rescinding a contract at law or in equity. Saunders v. Hatterman, 24 N. C. (2 Ired. L.) 32; 37 Am. Dec. 404; 14 Am. & Eng. Enc. Law, p. 34, and cases cited. Mr. Kerr, in his work on Fraud and Mistake, at page 83, says: 'A misrepresentation to be material should be in respect of an ascertainable fact, as distinguished from a mere matter of opinion. A representation which merely amounts to a statement of opinion * * * goes for nothing, though it may not be true, for a man is not justified in placing reliance on it.' Again: 'man who relies on such affirmations made by a person whose interest might so readily prompt him to invest the property

with exaggerated value does so at his peril, and must take the consequences of his own imprudence." * * *

"It is possible that, if the defendant and his clerks persevere in their efforts to master this machine, he may agree with his brother that 'the cash register is a good thing.' But if it turns out that he has sustained loss, not from any mechanical defect in the machine, he must attribute it to his own negligence and indiscretion. He did not exercise that diligence in making inquiry which the law expects of a reasonable and careful person. *Vigilantibus et non dormientibus jura subveniunt.*"

Question 34: (1.) State the facts, the question presented and the court's decision in the above case.

(2.) Why was the statement in this case one of opinion rather than fact?

Case No. 35. Brady v. Cole, 164 Ill. 116.

MR. JUSTICE PHILLIPS: " * * * It is not sufficient that Cole made statements that she was making a good trade and bettering her condition and that she could sell enough lots off the tract of land purchased by her to pay for the house. Those statements were mere matters of opinion and the mere expression of an opinion held by a party cannot, standing alone, be held a misrepresentation. * * * The reason of this rule is that while the person to whom the representations were made has a right to rely upon them, he is assumed to be equally able, from his own opinion, to come to as correct a decision as the other party, and therefore cannot claim to be misled by such opinion. Promises for the future and hope of realizing speculative profits are not present fraud. > * * *

Question 35: What were the facts in this case and what did the court decide? Is this statement of value, a statement of opinion or fact?

Case No. 36. Biewer v. Mueller, 254 Ill. 315.

Facts: Biewer owned certain lots in Chicago, which

he conveyed to Mueller for certain hotel property situated in Logansport, Indiana. A suit brought by a third party was pending at the time, which sought to establish a lien on the Logansport property. As security against the possible successful outcome of this suit, Mueller gave Biewer two deeds to Minnesota property, which Biewer had never seen, and which Mueller represented to be worth \$16,000, subject to a \$4,000 mortgage. As a matter of fact, this land was not worth \$4,000, the amount of the incumbrance upon it.

Point Involved: Can value ever be stated as a *fact* rather than an *opinion*? Under what circumstances?

MR. JUSTICE DUNN: “* * *

“It is argued for the appellants that the value of the property was equally open to the investigation of both parties and was a matter of opinion, against the false statement of which equity will not relieve. It is true that Biewer might have gone to Minnesota and seen the land, but it is not true that the parties had, at the time the trade was made, equal means of knowledge. Mueller owned the land, had seen it and would be presumed to know something of its value, while Biewer had never seen the land, which was in a distant state. >One cannot, by taking advantage of such a situation, induce another to accept his false statement of a fact and escape the consequences of his fraud by saying the other had no right to believe him. The property about the misrepresentation of the value of which complaint is made was not the property directly involved in the trade. It was collateral to the principal transaction, part of whose terms it was designed to secure, and the representation was made not to induce the appellee to purchase the property, but to accept it as security. <The general rule is that statements as to the value of a business or of property, made to induce one to buy or invest money, are treated as expressions of opinion, only, and if so intended and understood do not constitute fraud, in the absence of any concealment or misrepresentation of material, extrinsic facts. ‘The reason of the rule is that

such statements are expressions of opinion; but where they are made with the intention that they shall be understood as statements of fact, and not as the expressions of opinion, they will constitute fraud.' (Leonard v. Springer, 197 Ill. 532; Murray v. Tolman, 162 id. 417; Allen v. Hart, 72 id. 104.) The false statement of value was here made by Mueller, having superior means of knowledge, and was relied upon as a matter of fact and not opinion. It constituted fraud, which violated the agreement entered into partly in reliance upon it."

Question 36: (1.) State the facts in the above case, the question presented and the court's decision.

(2.) How do you distinguish this case from cases (34) and (35)?

Sec. 30. Silence and Concealment as Fraud.

Case No. 37. Grigsby v. Stapleton, 94 Mo. 423.

Facts: Suit for the contract price of 100 head of cattle. Defense, that the seller knew and did not disclose to the buyer, who did not know, that the cattle had "Texas Fever," a latent disease not readily discoverable on inspection.

Point Involved: If a seller knows of a defect in the thing sold, and the defect is of a character not ascertainable by the buyer on reasonable inspection, is the seller's mere silence with respect to such defect a fraud on the buyer?

BLACK, J.: "* * * < *Caveat emptor* is the general rule of the common law. If defects in the property sold are patent and might be discovered by the exercise of ordinary attention, and the buyer has an opportunity to inspect the property, the law does not require the vendor to point out defects. But there are cases where it becomes the duty of the seller to point out and disclose latent defects. * * * < When an article is sold for a particular purpose the suppression of a fact by the vendor, which fact makes the article unfit for the purpose for which it was sold, is a deceit; and, as a general

Let the buyer beware

rule, a material latent defect must be disclosed when the article is offered for sale, or the sale will be avoided.) 1 Whart. on Cont., sec. 248. The sale of animals which the seller knows, but the purchaser does not, have a contagious disease, should be regarded as a fraud when the fact of the disease is not disclosed, Cooley on Torts, 481. Kerr says: 'Defects, however, which are latent, or circumstances materially affecting the subject matter of a sale, of which the purchaser has no means, or at least has no equal means of knowledge, must, if known to the seller, be disclosed.' Kerr on Fraud and Mis. (Bump's ed.) 101. * * *

"There is no claim in this case that the defendant knew these cattle were diseased. It seems to be conceded on all hands that Texas fever is a disease not easily detected, except by those having had experience with it. The cattle were sold to the defendant at a sound price. If, therefore, plaintiff knew they had the Texas fever, or any other disease materially affecting their value upon the market, and did not disclose the same to the defendant, he was guilty of a fraudulent concealment of a latent defect. It is not necessary to this defense that there should be any warranty or representations as to the health or condition of the cattle. Indeed, so far as the case is concerned, if the cattle had been pronounced by some of the cattlemen to have the Texas fever, and, after knowledge of that report came to plaintiff, some of them to his knowledge died from sickness, then he should have disclosed these facts to the defendant. They are circumstances materially affecting the value of the cattle for the purposes for which they were bought, or for any other purpose, and of which defendant, on all the evidence, had no equal means of knowledge.

< "To withhold these circumstances was a deceit in the absence of proof that defendant possessed such information." >

Question 37: (1.) State the facts, the question presented and the decision of the court in the above case.

(2.) A offered for sale a mule to B, and B, about to examine the animal, desisted on A's statement that the mule would kick, and thereby did not discover lameness and malformation, which the examination would have revealed. A's statement was made to prevent B's inspection. Was there fraud? *Kenner v. Harding*, 85 Ill. 264.

Case No. 38. *The Clandeboye*, 70 Fed. 631.

Facts: The facts are stated in the opinion.

Question: Whether if one of the contracting parties, having from his superior position, knowledge of facts that are practically inaccessible to the other, and which materially affect the contract, merely remains silent as to such facts (making no misstatements and doing nothing otherwise to conceal such facts, or otherwise misleading) he is by his mere suppression of the truth guilty of fraud.

SEYMOUR, DISTRICT JUDGE: "The material facts of the case are as follows: The *Clandeboye*, a large and valuable British steamer, had become disabled by breakage of machinery, and had arrived off the Little Bahama Islands. Her mate had been sent by a ship's boat for assistance, and had on the 15th of May, 1894, arrived at Savannah. In pursuance of telegraphic instructions cabled to him by the owners, he had engaged the services of the *Morse* of New York, then, however, lying at the port of Philadelphia, which had agreed to proceed forthwith to the Little Bahamas and tow the *Clandeboye* to Vera Cruz, her port of destination, for the sum of \$5,000. Leo Lomm, the libellant, part owner and master of the tug *Dauntless*, lying at the time at its home port of Brunswick, Ga., having learned from the Savannah papers of the arrival at that port of the mate of the *Clandeboye*, and of the condition and location of that vessel, on the 17th of May telegraphed, through his agents, to Savannah, and received a reply stating that the tug *Morse* of New York had been chartered to go to the assistance of the *Clandeboye*. The distance from New York—and that from Philadelphia is about the

same—to Stranger's Cay, where the Clandeboye was lying, is more than 1,000 miles. From Brunswick the distance is about one-third as great. Captain Lomm's boat was lying idle. He concluded that he could beat the Morse in a race to the Clandeboye, and that, the master of the latter not knowing of the employment of the Morse, he could obtain a profitable job of salvage. The telegram announcing the employment of the Morse by the Clandeboye's owners reached Brunswick at a little after 3 P. M. of the 17th. Shortly after dark of the same day the Dauntless started for the Bahamas. She arrived at Stranger's Cay before noon of the 19th. Her master had the interview, and made with the master of the Clandeboye the contract, which is a matter in litigation, immediately thereafter, and in a couple of hours the vessels left for Newport News, one in tow of the other. Between three and four days afterward the Morse reached the spot where the Clandeboye had been lying at anchor, to find that she had gone. The conversation between the masters of the steamer and of the tug at Stranger's Cay contains the contract entered into between them and the words that led up to it. * * *

The material facts in the testimony are that Captain Lomm told Captain Strickland of the arrival of his mate in Savannah, but did not tell him of the employment of the Morse for his relief.

“The result of the enterprise of Captain Lomm will be disastrous to the owners of the Clandeboye if the decree of the District Court is allowed to stand. Captain Lomm declined to take the Clandeboye to Vera Cruz, the port to which her cargo was consigned, and did tow her to Newport News, where she was repaired. Fifteen hundred tons of her cargo had to be unloaded and then reloaded before she proceeded to Vera Cruz. Her owners were compelled to pay to the owners of the Morse the sum of \$1,900 for the services of that tug, and salvage compensation amounting to \$10,000—double what the Morse had agreed to charge for towing the Clandeboye to Vera Cruz—has been awarded to the Dauntless. But

the master of the steamship, in charge of his vessel, and not in communication with his owners, was fully empowered to contract with the owners of the Dauntless. The contract made was binding, unless invalidated by the conduct of Captain Lomm in concealing the fact that the owners of the Clandeboye had engaged the services of the Morse. * * *

"The arrangement entered into between the two masters constituted a contract, and is subject to the principles which regulate the validity of contracts. If valid, the courts of admiralty are bound to enforce it; if not, to set it aside, in accordance with the general rules affecting all contracts. The law of contracts requires of the parties to them mutual good faith. Is there any principle of mercantile law by which that obligation to good faith which required Captain Lomm to inform Captain Strickland of the hiring of the Morse is relaxed, and is not of so stringent a force as to make the omission fraudulent? * * * The general rule, both of law and equity, in respect to concealments, is that mere silence with regard to a material fact which there is no obligation to divulge will not avoid a contract. Thus if A, knowing that there is a mine in the land of B, of which B is ignorant, should contract to purchase the land without divulging the fact, it would be a valid contract, although the land were sold at a price which it would be worth without the mine, because A is under no legal obligation, by the nature of the contract, to give any information thereof. Fox v. Macreth, 2 Brown, Ch. 400, 1 White & T. Lead. Cas. eq. *172. 'Without some such general rule the facilities of sale would be greatly impeded, and there would be no security to the vendor' or to the vendee. Story, Cont. P. 517.

"It will be noticed that the general rule of law is a requirement of good faith in mutual dealings, and that the doctrine of *caveat emptor* is an exception to such requirement, founded upon special reasons, viz., the necessities of commerce, and the impossibility of so limiting any other doctrine as to do justice. As Chief Justice

Marshall says, 'it would be difficult to circumscribe the contrary doctrine within proper limits.' The necessities of commerce require that enterprise should be encouraged by allowing diligence at least its due reward, and not interfering with any proper and reasonably fair competition for intelligence. Any other course would set the active and the slothful upon an equality. '*Vigilantibus non dormientibus jura subveniunt.*'

"Even more weighty is the second reason given in support of the doctrine. The law works with blunt tools. Fallible memories, prejudiced statements, intentional falsehood, the bias of self-interest, ignorance, and stupidity, are all concomitants of much of the testimony from which she has to make up her judgments. General rules, applicable to the majority of cases, but sometimes having an oppressive bearing upon particular ones, make up the principles upon which, of necessity, she founds her decisions, for the law must be workable. It must be comprehensible to men who live under its rule, and must not be so complex as to overburden the memory with minutiae. Further, were it open, in all cases of contracts, for a dissatisfied party to cry off, by saying that the other party had known better than he the value of the subject-matter, or the market price, or some other extrinsic circumstance, there would be no finality in human dealings, and the only limitation to the litigation that would ensue would be that imposed by the diminution of business caused by such want of finality and certainty.

"But caveat emptor * * * is not applied (1) to cases of active fraud, one variety of which consists in misrepresentation of facts, including what is often equivalent, partial statements; it is not applied (2) to cases in which trust is implied by reason either of the relations to one another of the parties, or the nature of the contract; nor (3) to cases in which, in the absence of laches in the party injured, the persons dealing with one another do not deal upon mutually equal terms, by reason

of there being special knowledge in the possession of one party which is inaccessible to the other.

(1.) The case of actual or implied misrepresentation needs no illustration.

(2.) That of trust includes all the known fiduciary relations,—such as those of attorney and client, guardian and ward, agent and principal, and generally of all who stand in the relation of trustee and *cestui que* trust. It also includes dealings with regard to all matters which from their nature demand mutual confidence.

* * *

(3.) The case of information possessed by one party and absolutely unobtainable by the other, though of rarer occurrence, is one in which the enforcement of the rule of good faith is fully as imperative as it is in the two classes of cases first mentioned. It is perhaps not properly an exception to the doctrine of *caveat emptor*, but rather a case outside of its terms. The purchaser cannot look out for what he cannot have knowledge of.

* * *

“The case at bar is the first of the kind that has come before a court of admiralty, but it is as striking a one as could be imagined or invented. It is one in which one party to the bargain has knowledge of a fact which, if known to the other, would have prevented the making of the contract. The ignorance of the fact on the part of the second party is one which cannot be made a subject of controversy, and this ignorance was known to the party suing upon the contract. To give him the benefit of it, to the injury of the claimants, would be, in our opinion, a startling violation of the fundamental principle of all law, that equity is equality. We think that the agreement between the masters of the two vessels, made in the case at bar, is infected with all three of the vices stated, and is, therefore, not within the doctrine of *caveat emptor*. It must, therefore, be declared void under the principle that requires good faith in mutual dealings.

“(1.) Without placing as much stress upon the point

as upon the other two, we yet think it may be fairly held that in telling a part, but not the whole, of the truth to Captain Strickland, Captain Lomm was guilty of that suppressio veri which the law calls fraud. * * *

“(2.) The relation of salvor and saved, while not one of the fiduciary relations generally referred to in the law books, and accurately defined, as well as classified, is yet a fiduciary one. * * *

“(3.) Were the other reasons of declaring the contract void absent, we should unhesitatingly do so on the third ground, viz., because the parties were not dealing on terms of equality. There was on the part of Captain Lomm an intentional suppression of a material fact, in relation to which he was informed, while Captain Strickland had not access to any means of obtaining information of it. Looking at the position of the two parties to the bargain from another point of view, there appears to have been a striking inequality between them. The master of the *Clandeboye* had, when the *Dauntless* arrived at Stranger’s Cay, been for nearly four weeks in a disabled vessel. He had lain helpless at his anchorage for eleven days. His only assistant, who was a navigator (the mate of the vessel), was absent, and he was alone in authority over the *Clandeboye*. He was suffering from the pressure of anxiety, responsibility and delay. The master of the *Dauntless*, aware of all the circumstances, intent solely upon gain, fresh from home, with a mind disengaged and at ease, had an unfair advantage over him. In the short period during which he considered and agreed to accept the services proffered to him, Captain Strickland can hardly be supposed to have had the time or grasp of the facts that would have enabled him to have drawn all the inferences from the fact of his mate’s opportunities in Savannah that have been imagined by counsel. During that hurried interview between the masters of the two vessels, it doubtless confusedly occurred to the master of the *Clandeboye* that his mate was trying to do something for him, and that tugs would be at hand in a short time, prepared to tow him some-

where. Probably he thought of the nearest ports. His conversation shows that thoughts of this kind were in his mind. He was anxious to get away, and with the words 'first come, first served,' he made terms with Captain Lomm, whose tug had arrived first. But it would be unjust to suppose that he expected or had in his mind any thought of the possible existence of what was actually the fact, viz., a contract under which a powerful tug had been employed by his owners to tow him to the place to which he desired to be taken (Vera Cruz), and was already on the way to Stranger's Cay, near the Little Bahamas, where he was lying. We see no reason to doubt his statement that, if he had known of the employment of the Morse, he would not have employed the Dauntless. The parties were not dealing on equal terms, and their contract cannot be enforced. * * *"

Question 38: (1.) State the facts in the above case, and what the court decided.

(2.) What did the court say is the general rule with respect to concealment of a material fact as constituting fraud?

(3.) What reason did the court give for the doctrine of *caveat emptor*?

(4.) If A, knowing that there is a mine in the land of B of which he knows B to be ignorant, and should contract with B for the purchase of the land at a price that is merely the value of the land without the mine, would the contract be valid? How would you distinguish such a case from the case of the *Clandeboye*? How would you distinguish it from the case of the cattle with "Texas fever?"

(5.) What three classes of cases did the court say are not within the rule of *caveat emptor*?

Sec. 31. Duress.

Case No. 39. *Galusha v. Sherman*, 81 N. W. (Wis.) 495.

Point Involved: What is meant by the term duress? What tests have been applied?

MARSHALL, J.: " * * * It (duress) is a branch of the

law, that, in the process of development from the rigorous and harsh rules of the ancient common law, has been so softened by the more humane principles of the civil law, and of equity, that the teachings of the older writers on the subject, standing alone, are not proper guides. The change from the ancient doctrine has been much greater in some jurisdictions than in others. There are many adjudications, based on citations of authorities not in themselves harmonious, and many statements in legal opinions based on the ancient theory of duress, which together create much confusion on the subject, not only as it is treated by text writers, but by judges in legal opinions.

“Anciently, duress in law by putting in fear could exist only where there was such a threat of danger to the object of it as was deemed sufficient to deprive a constant or courageous man of his free will, and the circumstances requisite to that condition were distinctly fixed by law;

* * *

“Early in the development of the law, the legal standard of resistance that a person was bound to exercise for his own protection was changed from that of a constant or courageous man to that of a person of ordinary firmness. * * *

“Duress, in its broad sense, now includes all instances where a condition of mind of a person caused by fear of personal injury or loss of limb, or injury to such person’s property, wife, child, or husband, is produced by the wrongful conduct of another rendering such person incompetent to contract with the exercise of his free will power, whether formerly relievable at law on the ground of duress or in equity on the ground of unlawful compulsion.

“The true doctrine of duress, at the present day, both in this country, and England, is that a contract obtained by so oppressing a person by threats regarding his personal safety or liberty, or that of his property, or of a member of his family, as to deprive him of the free exercise of his will and prevent the meeting of minds neces-

sary to a valid contract, may be avoided on the ground of duress, whether the oppression causing the incompetency to contract be produced by what was deemed duress formerly, and relievable at law as such, or wrongful compulsion remediable by an appeal to a court of equity. The law no longer allows a person to enjoy, without disturbance, the fruits of his iniquity, because ^(c) his victim was not a person of ordinary courage; and no longer gauges the acts that shall be held legally sufficient to produce duress by any arbitrary standard, but holds him, who, by putting another in fear, shall have produced in him a state of mental incompetency to contract, and then takes advantage of such condition, no matter by what means such fear be caused, liable at the option of such other to make restitution to him of everything of value thereby taken from him. * * *

Question 39: (1.) Define duress; (2.) What was the ancient test, the later test and present day test of duress?

(3.) What effect has duress upon a contract?

Case No. 40. International Harvester Co. v. Voboril, 187 Fed. 973.

Facts: The Harvester Company sued Anna Voboril on her promissory notes which were given by her to pay the debts of her husband. Her defense was that her signature was obtained through threats by representatives of the Company, that, unless she signed, her husband would be arrested and imprisoned. It was contended that even if these threats were made, they would constitute no duress, because the husband had committed no crime for which he could be arrested. It appeared that Mrs. Voboril was an ignorant foreigner, the mother of seven children, and at the time pregnant with an eighth.

Point Involved: Whether a mere threat to arrest a near relative who has committed no crime can constitute duress if as a matter of fact the contracting party was, owing to the circumstances, peculiarly susceptible to fear in that regard.

HOOK, CIRCUIT JUDGE: “* * * It is contended, * * *, that even if the threats were made they could not in law have caused duress, because defendant’s husband had committed no offense, there was no officer present to make the arrest, and no warrant had been issued or proceeding commenced against him. The contention is untenable. Duress may be caused by threats of a criminal prosecution of a husband, wife, child, or other near relative of the person whose action is thereby controlled, though no crime has in fact been committed or prosecution begun. If the contracting party has been so put in fear as to be deprived of the free will power essential to contractual capacity, the transaction thereby induced may be avoided. A valid contract implies mutual voluntary assent of the parties; and if one of them overcomes the mind and will of the other by moral compulsion, and so obtains his concurrence, though the form and shell of a contract exist the very essence of it is wanting.

“Susceptibility to coercive influence is not uniform, and, in determining the question of duress, sex, age, state of health, family conditions, etc., may be considered with the other circumstances. In the case at bar the plaintiff had no claim against the defendant. The debtor was her husband, who had failed in business. Primarily she was neither legally nor morally responsible. The representatives of the plaintiff sought to obtain her guaranty of his obligations and to bind her separate estate for their payment. She was of Bohemian extraction and apparently ignorant of business affairs. She was the mother of seven children, the eldest of whom was 14 years of age, and was pregnant with an eighth. We must assume from the verdict and evidence that threats were made to have her husband arrested and jailed unless she signed and guaranteed the notes, and we cannot say as matter of law they were insufficient under the circumstances to deprive her of that freedom of will essential to voluntary action. All men appreciate how susceptible the mind of a wife and mother is to such influence, and how she may be coerced to give up her property when the liberty of hus-

band and father is believed to be at stake. It should be mentioned in this connection that the court excluded some of the testimony as to the condition of defendant and the state she was put in by the threats, which should have been admitted. It bore upon the vital feature of the defense."

Question 40: (1.) State the facts and the decision of the court in the above case.

(2.) Suppose the maker of the notes in the above case were an experienced business man, who signed the notes to pay his son's debts upon the threat that unless he signed, the son would be arrested, the son having committed no crime. Would your answer be the same?

(3.) Suppose in the case just put the son *had* committed a crime and he were threatened with arrest unless the father signed the notes. Would your answer be the same?

⤵(Note: Answer to (3) above: In the case put, the courts differ, but the better rule is that to threaten to arrest a near relative for a crime committed may be duress. *Shattuck v. Watson*, 53 Ark. 147. It may be duress to threaten one with arrest for the purpose of coercing him into a contract; but if the threat is made *bona fide*, and a contract thereby secured, the courts differ.)⤵

Sec. 32. Undue Influence.

Case No. 41. *Mors v. Peterson*, 261 Ill. 532.

Facts: Sarah Mors and others, as heirs and devisees of Mrs. Elizabeth Spruill, deceased, file their bill against Clarissa Peterson to set aside a deed executed by Mrs. Spruill to Clarissa Peterson, August 23, 1911, conveying to her 190 acres of land estimated to be worth \$50 per acre. The bill alleged that fraud, and undue influence was practiced on Mrs. Spruill, as well as her mental incapacity, as grounds for relief. Mrs. Spruill died April 23, 1912, aged 80 years. Her husband had been dead 20 years and she never had any children. During the last 10 years of her life Mrs. Spruill lived at the home of the defendant, Clarissa Peterson, who was her niece, and paid her for keeping her. During the last years of

her life she gradually declined and required constant attention which was rendered by Miss Peterson who also toward the last took charge of all of Mrs. Spruill's business generally. Just before the death of Mrs. Spruill, Miss Peterson called up an attorney and had him prepare a deed, which was then signed. Other facts appear in the opinion.

Point Involved: The nature of undue influence. Under what circumstances it will be presumed; what evidence required to overcome the presumption when entertained?

MR. JUSTICE VICKERS: “* * * The evidence as to the mental condition of Mrs. Spruill during the last few years of her life is conflicting. It can not be said that the weight of the evidence shows that her mental powers were more impaired than would ordinarily be expected in one of her age and condition of health. The evidence on this point shows that she had the physical and mental weakness that are usually incident to old age. Her mental condition is proper to be considered as strengthening the inference of undue influence which the law draws from an established fiduciary relation. The constant and intimate association of appellant with this feeble and helpless old lady for the last ten years of her life gives rise to an irresistible conclusion that there was trust and confidence on the one hand and influence and domination on the other. While the bill sets out all the circumstances connected with the execution of the deed and alleges undue influence and mental incapacity and prays for a cancellation of the deed, it is not, strictly speaking, a bill, as appellant's counsel appear to treat it, for the rescission of a contract on the ground of mental incapacity of the party to enter into it. The bill alleges a state of facts which are fully established by the proof, which show that a fiduciary relation existed between these parties; that while such relation existed the deed in question was executed without any adequate consideration; that by said deed appellant acquired title to real estate worth between \$9,000 and \$10,000, and the bill calls on the appellant to rebut the presumption which the law draws from the fiduciary re-

lation established, and show, by clear and convincing proof, that she acted with good faith and did not betray the confidence reposed in her. The decree below canceling this deed is merely an adjudication that appellant has wholly failed to remove the suspicions which necessarily grow out of the nature of the transaction and the relation of the parties.

“Courts of equity have refused to set any bounds to the circumstances out of which a fiduciary relation may spring. It not only includes all legal relations, such as guardian and ward, attorney and client, principal and agent, and the like, but it extends to every possible case in which a fiduciary relation exists in fact, and in which there is confidence reposed on one side and resulting domination and influence on the other. (*Beach v. Wilton*, 244 Ill. 413.) It is not necessary that the relation and duties involved be legal. They may be either moral, social, domestic, or merely personal. (*Roby v. Colehour*, 135 Ill. 300; *Walker v. Shepard*, 210 id. 100.) When a confidential or fiduciary relation is established between parties, courts of equity scrutinize very closely any transaction or contract between the parties by which the dominant party secures any profit or advantage at the expense of the person under his influence. All transactions between parties in this relation are presumptively fraudulent and void, and before a court of equity will permit such contract to stand, the proof must be clear and convincing and satisfy the conscience of the chancellor that good faith has been exercised and that the confidence reposed in the beneficiary of the contract has not been betrayed by him. *Beach v. Wilton*, *supra*, and authorities there cited.

“The circumstances connected with the execution of the deed in question, as disclosed by the evidence, are: Appellant called upon an attorney and had him prepare a deed. After having the deed written up, the appellant telephoned Sidney Bagley and asked him to come over to the house. Bagley was a justice of the peace. He went to appellant's house and after consulting with appellant

a notary public was called. The matter of executing the deed was discussed by appellant, Bagley and the notary public. The deceased was in another room. After the matter had been talked over among the three parties Bagley entered the sickroom where the old lady was and presented the deed to her and she made her mark, and thereupon Bagley placed a silver dollar in her hand, which had been given him a few minutes before by appellant. J. E. Keisling, the notary public, says that after the deed was executed it was read over to Mrs. Spruill, and Bagley says that he asked her, before she made her mark to the deed, if she wanted to give the land, or deed the land, to appellant, and was answered, 'Yes.' Thereupon the notary added his certificate of acknowledgment and the deed was handed to appellant. Before the execution of this deed Mrs. Spruill had made a will in which she disposed of all her property, including the land in controversy. By her will appellant was given 11/20ths of the estate and the balance was disposed of among other relatives.

"When all of the circumstances surrounding this transaction are considered we can come to no other conclusion than that reached by the court below, that there was here an unusually intimate fiduciary relation existing between these parties, and that the conveyance to appellant of substantially all of the property that the deceased owned must be held to be the result of a violation of the confidence and trust reposed by this old lady in appellant. At all events, the evidence introduced on behalf of appellant fails to convince us, any more than it did the chancellor below, that this transaction is free from any suspicion of undue influence.

"The deed contains a covenant on the part of appellant that she would take care of Mrs. Spruill as long as she lived and provide her with a good home, board, food, shelter and care during her life. Appellant contends that even though the court properly set aside the deed it was error to set it aside unconditionally, without requiring the payment to appellant of reasonable compensation

for taking care of the old lady from the time the deed was executed until her death. The evidence shows that notwithstanding this covenant in the deed appellant continued to demand of Brown compensation for taking care of the old lady at the rate of \$10 per week under her contract. Numerous letters written by appellant to Brown demanding money are in the record. The last of these was about two weeks before the death of Mrs. Spruill. This evidence shows that appellant was relying on her contract for compensation for taking care of the deceased, and that she did not furnish her a home, board, food and shelter as a consideration for the conveyance. If appellant has any claim against the estate, under her contract with Brown, for compensation she has not been deprived of that by the decree in this case. There was no error in the decree in this respect.

“There being no error in the decree of the circuit court of Fayette county it will be affirmed.—*Decree affirmed.*”

Question 41: Enumerate the relationships stated in the above case in which undue influence will be presumed. In case of a presumption of undue influence, may the contract still stand notwithstanding such presumption? How?

Sec. 33. Conditions of Disaffirmance of Contracts Voidable for Fraud, Etc.

Case No. 42. Tarkington v. Purvis, 128 Ind. 182.

Facts: On August 15, 1887, Jos. S. Tarkington, exchanged his interest in the firm of T. H. Ellis & Co., hardware dealers, for certain real estate and \$600 in cash, with Sanford B. Purvis, who agreed to pay Tarkington's share of the firm's indebtedness. Tarkington falsely represented that the assets of the firm were largely in excess of its liabilities. As a matter of fact, the reverse was true, so that Tarkington's interest was of no value whatever. On August 27th Purvis discovered the fraud practiced upon him and immediately demanded rescission,

tendering back all he had received. On August 30, Purvis received \$341 in cash out of proceeds arising from a sale of some of the assets of the firm, such sale being evidently made to prevent waste of the assets. On September 1st, he again demanded rescission, offering also this \$341 collected by him. It is contended that in dealing with the partnership property in the manner shown the plaintiff ratified the contract.

Point Involved: What facts constitute ratification of a fraudulent contract? Dealing with the subject matter as ratification.

MITCHELL, J.: "The doctrine is fully established that a contract induced by fraud is only voidable, and if one who has been defrauded after discovering the deceit acquiesces in the sale either by express words or by any unequivocal act, such as treating the property as his own, with an intent to condone the fraud, he will be deemed to have elected to affirm the contract, and he cannot afterwards rescind. One who, uninfluenced by the fraud, deals with the property as his own, after having fully discovered that fraud has been practiced upon him in the contract or transaction by or through which he acquired the property, thereby waives his right to rescind. *St. John v. Hendrickson*, 81 Ind. 350; *Higham v. Harris*, 108 Ind. 246, 5 West. Rep. 643; *Worley v. Moore*, 97 Ind. 15; *Doherty v. Bell*, 55 Ind. 205; *Gatling v. Newell*, 9 Ind. 572; *Comparet v. Hedges*, 6 Blackf. 416; *Shaeffer v. Sleade*, 7 Blackf. 179; *Benjamin, Sales*, sec. 675.

"Equivocal acts, however, which do not clearly evince a purpose, with complete knowledge of the fraud, to retain the property as his own, will not defeat the right of the person defrauded to rescind. The act must be unequivocal and must show an election to retain the property, after discovering the deceit, before the right to rescind is gone.

"In the present case the right to claim a rescission had been fully perfected by the appellee, by tendering back everything that had been received, and by offering to place the fraudulent vendor in *statu quo*. That the plain-

tiff below afterwards received money arising from the sale of some of the assets of the firm in no way militates against his right to compel the rescission since it does not appear that the property was sold in the course of the business of the firm, and the money received was fully accounted for without loss to the appellant. One who has perfected his right to rescind a fraudulent contract cannot lose it by merely taking care of the property received, or by preserving it in case it is of a perishable nature, unless what he does is done with the intent to confirm the contract. He is not bound to preserve perishable property, but if he acts in good faith in preventing reasonable apprehended loss or destruction and waste of the property, his perfected right of rescission will not be lost in a court of equity, if he fairly accounts for the property without loss to the vendor, and places him in *statu quo* as nearly as may be. *Pierce v. Wilson*, 34 Ala. 596; *Neblett v. Macfarland*, 92 U. S. 101 (23 L. ed. 471); *Wharton, Cont. sec. 285*.

“Where subsequent acts are relied upon as a defense in a case where fraud is clearly established, it is said the act must stand upon the clearest evidence, and must evince a purpose to waive or forgive the fraud, and must amount to a clear election not to rescind. If what is done is merely for the purpose of saving the plaintiff from further loss, without any purpose to give up whatever right he may have either at law or in equity to rescind, the right or rescission will not be affected. *Montgomery v. Pickering*, 116 Mass. 227; *Morse v. Royal*, 12 Ves. Jr. 355-373.”

Question 42: State the rule of this case. Show why the acts of the defrauded party in this case were not a ratification of the contract.

(Note: A party who desires to rescind a voidable contract may be barred by his *mere delay*. He must act with reasonable diligence where from all the circumstances he would reasonably be deemed by the other to have waived the ground on which he might avoid. What constitutes reasonable diligence depends on

the circumstances. In *Burwash v. Ballou*, 230 Ill. 34, where the suit was to rescind a sale of mining stock, the court said:

“* * * The rule is that a party who desires to rescind a sale for fraud must act promptly; that he cannot be permitted to stand passively by and speculate as to the result of an investment in mining stock, which usually fluctuates in value, and after the future has disclosed his investment was a mistake, rescind the contract of purchase for fraud and recover back the consideration paid for the stock * * *”

For a case discussing the duty to be diligent in rescinding, and conduct amounting to affirmation, see Case No. 184, *post*.

It is also necessary that a party seeking rescission place or offer to place the other in *statu quo* where that is possible. He must tender back what he has received under the contract.)

CHAPTER FOUR

CONSIDERATION

- A. Theory and nature of consideration. B. Examples of consideration.

A. Theory and Nature of Consideration.

- § 34. Consideration defined. § 35. Adequacy of consideration.

Sec. 34. Consideration Defined. Necessary in Simple Contracts.

Case No. 43. Rann v. Hughes, 7 Term Rep. (England) 346.

Facts: Suit against an administratrix upon a written unsealed promise on her part to pay a debt of the deceased.

Point Involved: Whether a written, unsealed promise to pay the debt of another, not induced by some act or promise, is of a contractual character, i. e., whether a simple contract is enforceable without consideration.

LORD CHIEF BARON SKINNER: “* * * It is undoubtedly true that every man is by the law of nature bound to fulfill his engagements. It is equally true that the law of this country supplies no means, nor affords any remedy, to compel the performance of an agreement made without sufficient consideration; such agreement is *nudum pactum ex quo non oritur actio*; and whatsoever may be the maxim in the civil law, it is in the last mentioned sense only that it is to be understood in our law.

* * *

“All contracts are by the law of England distinguished into agreements by specialty, and agreements of parol; nor is there any such third class as counsel have endeavored to maintain as contracts in writing. If they be merely written and not specialties, they are parol and a consideration must be proved. * * *”

Question 43: (1.) State the facts in the above case, the question presented and the court's decision.

(2.) Is there any distinction between oral and written contracts so far as necessity of consideration is concerned?

Case No. 44. Page, Contracts, Sec. 274, 276.

(1) {“A valuable consideration is some legal right acquired by the promisor in consideration of his promise, or forborne by the promisee in consideration of such promise.”} A common form of stating the same principal is that a valuable consideration for a promise may consist of a benefit to the promisor, or a detriment to the promisee.

“The use of ‘benefit’ and ‘detriment’ in this connection need explanation. While correct if properly understood, it is liable to misconstruction. ‘Benefit’ does not refer to any pecuniary gain arising out of the transaction nor ‘detriment’ to any pecuniary loss. * * * {‘Benefit’ as used in this rule means that the promisor has, in return for his promise, acquired some legal right to which he would not otherwise have been entitled; ‘detriment’ means that the legal right which he would otherwise have been entitled to exercise.”} * * *

(276) “* * * We observe that in most cases that something that is the ‘benefit’ to the promisor, is also a ‘detriment’ to the promisee, the former acquiring what the latter parts with. This, however, is not necessary. It is sufficient if there is a ‘benefit’ to the promisor, without any ‘detriment’ to the promisee, * * *. It is equally sufficient if there is a ‘detriment’ to the promisee without any ‘benefit’ to the promisor. * * *”

Question 44: (1.) Define consideration.

(2.) What is meant in this definition by the terms 'benefit' and 'detriment'?

(Note: Illustration of consideration. A contracts to sell B a horse for \$50. The consideration for A's promise is B's promise and *vice versa*. A in his capacity of promisee sustains a detriment, i. e., as promisee, or one *to whom* the promise was made, he has in return for such promise, made a promise of his own, which, when suit arises, may or may not have been performed by him. In this case, both A and B are promisors and promisees. Take another case. A sells B a horse on credit for \$50, B taking immediate possession of the horse. A here is the sole promisee, his detriment consisting in his parting with his right to keep the horse on the strength of B's promise. {Take Case No. 43 where the administratrix promised to pay the debt of her intestate. The creditor was the promisee, but had sustained no detriment on account of the promise, in other words had parted with nothing, had not promised to part with anything and had done nothing by reason of the promise. The *debt* or detriment was *already* existing. Had the creditor given up his right to present his claim, or withheld suit a definite time, or in any way suffered a loss of rights to which he was legally entitled, the promise of the administratrix would have been enforceable. See following cases for examples of consideration.} Ed.)

Sec. 35. Adequacy of Consideration.

Case No. 45. Schnell v. Nell, 17 Ind. 29.

Facts: For and in consideration of one cent, Schnell agreed to pay \$600 to Nell and others.

Point Involved: Whether adequacy of consideration is material to the validity of the contract.

PERKINS, J.: "The consideration of one cent will not support the promise of Schnell. It is true that as a general proposition, inadequacy of consideration will not vitiate an agreement. * * * But this doctrine does not apply to a mere exchange of sums of money, of coin whose value is exactly fixed, but to the exchange of something of, in itself, indeterminate value for money, or perhaps, for some other thing of indeterminate value. In this case had the one cent mentioned been some particu-

lar one cent, a family piece, or ancient, remarkable coin, possessing an indeterminate value, extrinsic from its simple money value, a different view might be taken.

* * *"

Question 45: State the rule with reference to whether the adequacy of consideration is material.

(Note to Case No. 45: In various ways inadequacy of consideration may become very material. (1.) If fraud is alleged the inadequacy of the consideration may with other evidence tend to show the fraud. (2.) If specific performance of a contract is sought, the fact that the complainant has driven an unfair bargain will deprive him of this equitable remedy and he must seek his remedy at law for damages.

From the mere standpoint of the validity of the contract inadequacy is immaterial. As one may *give* away his property and rights, it follows he may sell for whatever price he chooses. Were it otherwise, there could be no freedom in private bargaining.)

B. Examples of Consideration.

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| § 36. Promises as consideration. | § 38. Performance of or promise to perform executory contract. |
| § 37. Generally of sustaining detriment. | § 39. Part payment of debt as consideration for discharge of whole. |
| § 38. Past act and promise to perform moral obligation. | § 40. Compromise and settlement. |
| § 39. Performance of or promise to perform obligations imposed by law. | |

Sec. 36. Promises as Consideration.

Case No. 46. American Cotton Oil Co. v. Kirk, 68 Fed. 791.

Facts: This was an agreement to sell 10,000 barrels of oil at a stipulated price, in such quantities per week as the buyer might desire. Action for the breach of the alleged contract:

Point Involved: A promise is a valid consideration if of sufficient certainty to be enforceable. What constitutes sufficient certainty?

BUNN, DISTRICT JUDGE: “* * * There are several questions * * * but we have found it necessary to determine but one, and that is whether the contract * * * is a valid contract for the sale and delivery of 10,000 barrels of oil, or is it invalid for want of mutuality in its provisions? A promise on the part of the defendant to sell and deliver 10,000 barrels, without a corresponding agreement on the part of the plaintiffs to purchase and receive it, would clearly be void for want of mutuality. Where, in this contract, as testified to by the plaintiffs, is there any agreement to order and receive 10,000 barrels? It is clear that the time of ordering, as well as the quantity, is left wholly to the discretion of the plaintiffs. Deliveries are to be made per week, as Kirk & Company desire. But suppose Kirk & Company do not desire, and do not order, or order in such quantities as would require a hundred years to complete the delivery,—is there any way open to the defendant to put plaintiffs in default? We think not, and that there is no mutuality of promise for the sale of a definite or ascertainable quantity of oil. Suppose the plaintiffs had decided upon ordering six barrels of oil per week or one barrel for every working day. That would require 32 years for the fulfillment of the contract. And we can discover no way, by the terms of the contract, whereby the defendant could put the plaintiffs in default for failure to order more oil each week, because the amount and times of ordering are left wholly to the plaintiffs. If the market price of oil should fall below the contract price, then, according to their contention as to the terms of the contract, the plaintiffs could purchase their supply of oil elsewhere and at the lower price, resorting to the contract when, and only when, the price stated was lower than the market price—and this without respect to time. Such a contract is one-sided, and without mutuality. If the contract had been that the plaintiffs should order and receive, and the defendant should ship, all the oil which would be required in the plaintiff’s business for a definite period, not exceeding 10,000 barrels, there would be

a mutual obligation. The plaintiffs could not, in such case, order oil from other sources, and could be put at fault for not ordering and receiving all which was reasonably required to run their plant. The case would then come within the principle of *National Furnace Company v. Keystone Manufacturing Company*, 110 Ill. 427. In that case the National Furnace Company agreed to sell to the Keystone Company all of certain quality of pig iron, known as Lake Superior Charcoal Iron, which the Keystone Company would need, use or consume in its business during the coming season from July 9, 1879, to July 1, 1880, such amount supposed by the parties to be about 700 tons. This was held to be a good contract. The Court says: 'It cannot be said that the appellee (Keystone Company) was not bound by the contract. It has no right to purchase iron elsewhere for use in its business. If it had done so, appellant might have maintained an action for breach of the contract.'

["In the case at bar, there was no agreement on the part of plaintiffs to purchase from defendant all the oil they required in their business. They might order as little as they pleased, and supply the bulk of what they needed from other sources. The contract had the effect merely to bind the plaintiffs to receive and pay for at the stipulated price all the oil which might be shipped upon their order, from time to time, by the defendant, not exceeding 10,000 barrels. Further than that it can have no binding force, for want of mutuality.) * * * "

Question 46: (1.) State the facts, the question presented and the decision of the court in the above case.

(2.) What was the difference between the facts in this case and the facts in the *National Furnace Company* case cited and discussed in the above opinion?

(3.) A agreed to sell and B agreed to buy, at specified prices, 2,000 cases Old Walker Whiskey, in 1909, 3,000 cases in 1910, 4,000 cases 1911, and 5,000 cases 1912, and the contract provided: "If for any unforeseen reason, the party of the second part find they cannot use the full amount of the above named goods, the party of the first part agrees to release them from the contract

for the amount desired by the party of the second part." A then refused to deliver whiskey to B under this agreement, and B sues for damages. Should he recover? *Rehm-Zeiker Co. v. F. G. Walker Co.*, 156 Ky. 6; 49 L. R. A. new series, 694. 2

Sec. 37. Generally of Sustaining Detriment.

Case No. 47. *Hamer v. Sidway*, 124 N. Y. 538.

Facts: A, uncle of B, promised B, who was then a minor, that if B would refrain from drinking, using tobacco, swearing and playing cards or billiards until 21 years of age, he would pay B \$5,000. To this B assented. The promisor is now dead and one Sidway, who has secured B's claim, seeks to enforce it against the executor of A's estate.

Point Involved: If one induces another by a promise of reward to pursue a certain way of life, which is of no benefit to the promisor and possibly of much actual benefit to the promisee, does the acceptance of such promise constitute a legal detriment to such promisee?

PARKER, J.: "The defendant contends that the contract was without consideration * * * and therefore invalid. He asserts that the promisee * * * was not harmed but benefited; and insists that * * * unless the promisor (the uncle) was benefited, the contract was without consideration. * * * < Courts will not ask whether the thing which forms the consideration does in fact benefit the promisee or a third party, or is of any substantial value to any one. {It is enough that something is promised, done, forborne, or suffered by the party to whom the promise is made as consideration for the promise made to him.} *Anson's Prin. of Con.* 63. 'In general a waiver of any legal right at the request of another party is a sufficient consideration for a promise.' *Parsons on Contracts*, 444.

"Now, applying this rule to the facts before us, the promisee used tobacco, occasionally drank liquor, and he had a legal right to do so. That right he abandoned for a period of years upon the strength of the promise of the

testator that for such forbearance he would give him \$5,000. * * *

Question 47: (1.) State the facts, the question presented and the court's decision in the above case.

(2.) A manufactured a certain medicine for asthma and advertised that if any one troubled with that disease would take a certain dose every day for three months, and remained uncured, he would pay such person \$500. B read the advertisement, and took the medicine as directed. Being uncured, he sued A. Could he recover?

(3.) A promised B, that if B would name his son C after A, he, A, would pay him \$10,000. B accepted and did so. Can B recover the money? *Gardner v. Dennison*, 105 N. E. (Mass.) 359.

Sec. 38. Past Act; Promise to Perform Moral Obligation.

Case No. 48. *Mills v. Wyman*, 3 Pick. (Mass.) 207.

Facts: Defendant's adult son fell sick among strangers. Plaintiff cared for him. Defendant hearing of this promised to pay plaintiff for what he had done, but afterwards refused. This is a suit to enforce defendant's promise.

Point Involved: Is a promise to pay for a past act, gratuitously performed, enforceable as a contract.

PARKER, C. J.: "General rules of law established for the protection and security of honest and fair minded men, who may inconsiderately make promises without any equivalent, will sometimes screen men of a different character from engagements which they are bound in *fora conscientiae* to perform. * * * The rule that a mere verbal promise, without any consideration, cannot be enforced by action, is universal in its application and cannot be departed from to suit particular cases in which a refusal to perform such a promise may be disgraceful.

"The promise made in this case appears to have been made without any legal consideration. The kindness and services toward the sick son of the defendant were not bestowed at his request. The son was in no respect

Reason for rule

under the care of the defendant. He was twenty-five years old, and had long left his father's family. On his return from a foreign country he fell sick among strangers, and the plaintiff acted the part of the good Samaritan, giving him shelter and comfort until he died. The defendant, his father, * * * promises in writing to pay the plaintiff for expenses he had incurred. But he has determined to break his promise.

"It is said that a moral obligation is a sufficient consideration to support an express promise, * * *; but * * * we are satisfied that the universality of the rule cannot be supported, * * *. The cases of debts barred by the statute of limitations, or debts incurred by infants, or debts of bankrupts, are generally put for illustrations of the rule. Express promises founded on such pre-existing equitable obligations may be enforced; there is a good consideration for them; they merely remove an impediment created by law to the recovery of debts honestly due, but which public policy protects the debtors from being compelled to pay. * * * In all these cases there is a moral obligation founded upon an antecedent valuable consideration. * * *" [The Court holds this promise to raise merely a moral and not a legal obligation and therefore unenforceable.]

Question 48: How did the court distinguish from this case, the cases of promises to pay debts barred by the statute of limitations, debts incurred by infants, and debts of bankrupts?

Sec. 39. Performance of or Promise to Perform Obligations Imposed by Law.

Case No. 49. Hogan v. Stophlet, 179 Ill. 150.

Facts: Hogan was sheriff of P. County. A building belonging to Stophlet having been destroyed by an incendiary fire, Stophlet offered a reward for the apprehension and conviction of the culprit. Hogan now sues to recover the reward.

Point Involved: If the law imposes on one a duty to do

a certain thing, is the performance of that duty sufficient to support a promise by another to pay for it?

MR. JUSTICE MAGRUDER: “* * * It being true, that it was the official duty of the appellant as sheriff to make the arrest of the guilty party, and that the fees, which he is entitled to charge for the performance of his official duties are fixed by law, it follows upon well established principles that the appellant was not entitled to the reward sued for in this case. It is against public policy to allow a man to recover a reward for doing his duty as a public officer. * * * A promise to pay an officer a reward for doing what it is his duty to do under the law is a promise without any consideration to support it. * * *”

“The claim that extra services have been rendered furnishes no warrant in such cases for the charge of extra compensation. * * * If a constable for making extraordinary efforts to perform an ordinary official act, * * * may collect by law a compensation beyond what the statute allows for the act, any other officer may do the same; and sheriffs, legislators and judges might * * * find their ‘extraordinary efforts’ in the market to be had by the highest bidder. This is a sickening and revolting view of the subject.

“There are some decisions * * * to the contrary * * * where the officer arrested the offender beyond his territorial jurisdiction. * * *”

Question 49: (1.) Upon what two grounds did the court in the above case deny the plaintiff his case?

(2.) A is a fireman whose sworn duty is to do his utmost to put out fires. B’s house takes fire and B offers a reward of \$500 if A will rescue B’s wife who is on an upper story in the burning building. A at the risk of his life accomplishes the rescue. Can he force B to pay the reward?

Sec. 40. Promise to Perform Executory Contract.

Case No. 50. Johnson’s Adm’r v. Seller’s Adm’r, 33 Ala. 265.

Facts: Johnson agreed to teach school at Camden and bring his wife as an assistant. Afterwards, threatening not to bring her, he was promised additional compensation to do so. The promisor now refuses to pay the additional compensation.

Point Involved: If one induces a promise of extra benefit by threatening to break his contract unless such benefit is forthcoming, is there any consideration for the promise?

WALKER, J.: “* * * The ninth and tenth charges assert the proposition that if Johnson contracted to bring and associate his wife with him in teaching school and then refused to comply with that contract, a promise by Sellers to give him \$2,500, in order to induce him to comply, would be without consideration. In our judgment these charges are correct. Johnson by his contract was legally bound to bring his wife to teach in the school if the contract was such as the charge supposes. He had no *right* to violate that contract and compensate the injured party in damages.* * *

“If two parties make a contract, one of them may waive the performance of the contract by the other, and assume some new and additional obligation as the consideration for the performance by the other. Such obligation would be binding.

“* * * It is competent for the parties to a contract to waive their rights growing out of it as originally made, and engraft upon it new terms. * * *

Question 50: State the facts, the question presented and the court's decision in the above case.

(Note: It is generally agreed that a mere promise by one to perform his contract is not a consideration to support a promise to pay him additional compensation for so doing. Such cases arise where one party refuses to go on with his contract unless some greater inducement is offered than that for which he undertook to perform. Yet, consistently with this doctrine, the parties to a contract may always agree to modify its terms, or to abandon it altogether and then make a new contract.

✓ In some states the doctrine has had an exception made to it, as shown in the following case.)

Case No. 51. Linz v. Shuck, 106 Md. 220.

Facts: Plaintiff made a written contract to dig a cellar for defendant for \$500. After beginning work, he discovered a large quantity of soft mud beneath the surface of the ground, the existence of which was unsuspected by either party, and which made the digging of the cellar much more expensive and difficult. Plaintiff alleges that he then refused to complete the contract and that defendant thereupon induced him to do so by promising to pay the additional expenses caused by draining, etc.

Point Involved: Whether when one is under a contract to do certain work, and in doing it, certain difficulties arise that were unforeseen by both parties, a promise to pay additional compensation for the completion of the contract is enforceable.

Boyd, J.: “* * * The principal question in the case is whether the plaintiff was entitled to recover for the additional costs and expenses incurred. * * * (here the court sets out plaintiff’s fifth ‘prayer’). That prayer seems to have followed quite closely the language used in King v. Duluth, M. and N. R. Co., 61 Minn. 487, 63 N. W. 1105, which case, notwithstanding unfavorable criticism by some writers, in our opinion announces a principle which is not only just and equitable, but is easily reconcilable with the general rule that a promise to do, or actually doing that which a party to a contract is already under legal obligation to do, is not a valid consideration to support the promise of the other party to the contract to pay additional compensation for such performance. * * *

Gen. rule When two parties make a contract, based on supposed facts which they afterwards ascertain to be incorrect, and which would not have been entered into by one party had he known the actual conditions which the contract required him to meet, not only courts of justice, but all right think-

he must not be retained

ing persons must believe the fair course for the other party to the contract to pursue is either to relieve the contractor of going on with his contracts or to pay him additional compensation. If the difficulties be unforeseen, and such as neither party contemplated or could have from the appearance of the thing to be dealt with anticipated, it would be an extremely harsh rule of law to hold that there was no legal way of binding the owner of property to fulfil a promise made by him to pay the contractor such additional sum as such unforeseen difficulties cost him, * * *"

Question 51: (1.) State the facts, the question presented and the court's decision in the above case.

(2.) Assuming there had been no additional promise in the above case, would the contractor have been guilty of breach had he abandoned the contract on account of such unforeseen difficulty?

(Note to above case: In a few states the doctrine of the above case has been adopted. It is known as the "Minnesota doctrine." It is a doctrine difficult to support on the theory of consideration, and it is not recognized in most of the states. The student must not get the impression that the above contract was not enforceable as originally made. An abandonment would have been a breach.)

Sec. 41. Part Payment of Debt as Consideration for Discharge of Whole Debt.

(a) The general rule.

(b) The rule not applicable and qualifications of the rule.

(a) The General Rule.

Case No. 52. Pinnell's Case, 5 Co. 117.

"Pinnel brought an Action of Debt on a Bond against Cole of 16 l. for Payment of 8 l. 10 s. the 11th Day of November, 1600. The Defendant pleaded, that he at the Instance of the Plaintiff, before the said Day, scil. 1 Octob. Anno 44. apud W. solvit querenti 5 l. 2 s.

2d. *quas quidem* 5 l. 2s. 2d. the Plaintiff accepted in full Satisfaction of the 8 l. 10s. And it was resolved by the whole Court, That {Payment of a lesser Sum on the Day in Satisfact. of a greater, cannot be any Satisfaction for the whole, because it appears to the Judges that by no Possibility, a lesser Sum can be a Satisfaction to the Plaintiff for a greater Sum: But the Gift of a Horse, Hawk, or Robe, &c. in Satisfaction is good.} For it shall be intended that a Horse, Hawk, or Robe, &c. might be more beneficial to the Plaintiff than the Money in Respect of some Circumstance, or otherwise the Plaintiff would not have accepted of it in Satisfaction. But when the whole Sum is due, by no Intendment the Acceptance of Parcel can be Satisfaction to the Plaintiff: But in the Case at Bar it was resolved, that {the Payment and Acceptance of Parcel before the Day in Satisfaction of the whole, would be a good Satisfaction in Regard of Circumstance of Time; for Peradventure Parcel of it before the Day, would be more beneficial to him than the whole at the Day, and the Value of the Satisfaction is not material} So if I am bound in 20 l. to pay you 10 l. at Westminster, and you Request me to pay you 5 l. at the Day at York, and you will accept it in full Satisfact. of the whole 10 l. it is a good Satisfact. for the whole: For the Expences to pay it at York, is sufficient Satisfaction; But in this Case the Plaintiff had Judgment for the insufficient Pleading; for he did not plead that he had paid the 5 l. 2s. 2d. in full Satisfaction (as by the Law he ought) but pleaded the Payment of Part generally; and that the Pl. accepted it in full Satisfaction. And always the Manner of the Tender and of the Payment, shall be directed by him who made the Tender or Payment, and not by him who accepts it. And for this Cause Judgment was given for the Plaintiff.

“See Reader 26 H. 6. Barre 37. in Debt on a Bond of 10 l. the Defendant pleaded, that one F. was bound by the said Deed with him, and each in the whole, and that the Plaintiff had made an Acquittance to F. bearing Date before the Obligat. and delivered after, by which Ac-

quittance he did acknowledge himself to be paid 20s. in full Satisfaction of the 10 l. And it was adjudged a good Bar; for if a Man acknowledges himself to be satisfied by Deed [instrument under seal], it is a good Bar, without any Thing received. Vide. 12 R. 2, Barre 243. 26 H. 6 Barre 37, & 10 H. 7, &c."

Question 52: Was the defense in this case good on the facts thereof? Under what facts would it not have been good?

(Note: The proposition that (payment of a lesser sum than is due can not support a promise to release the entire debt) is the great weight of authority. The rule has, however, been judicially repudiated in the case of Clayton v. Clarke, 74 Miss. 499; 37 L. R. A. 771, and has been changed by statute in some states (Alabama, Georgia, Maine, North Carolina, Tennessee and Virginia). It has also in all jurisdictions been confined to the narrowest limits. See following cases.)

(b) The Rule Not Applicable and Qualifications of the Rule.

Case No. 53. Snow v. Griesheimer, 220 Ill. 106.

Facts: There was a dispute between the parties as to the amount of rent due from G. to S. on account of certain repairs made by G., the tenant, for which he claimed S., as landlord, promised to reimburse him. G. sent checks to S., marking them as in "full payment." S. received and banked the checks but insisted that they were only received on account, and afterwards sued for the balance claimed.

Point Involved: If the amount of a debt is in dispute, is an agreement to accept in full settlement an amount less than the full amount claimed by the creditor supported by a good consideration? Is the acceptance and retention of a check an acceptance of the terms on which it is sent, notwithstanding protests to the contrary?

MR. CHIEF JUSTICE CARTWRIGHT delivered the opinion of the Court: " * * * [The law is that where the amount due a creditor is ascertained and not in dispute the payment by the debtor and acceptance by the creditor of a

less sum will not operate as a satisfaction of the demand, but if the amount due is unliquidated or there is a bona fide dispute as to how much is due, a payment of the amount claimed by the debtor to be due, in full settlement, if accepted by the creditor is a satisfaction of the claim.) It is not necessary that the debtor shall pay more in that case than he admits to be due, and if a check for such sum is offered in payment of a disputed account, it must be accepted by the creditor upon the terms upon which it is offered or must be rejected. If a check is offered in full payment of the demand, an acceptance will satisfy the demand although the creditor protests at the time that it is not all that is due him or that he does not accept it in full satisfaction of his claim. * * *"

Question 53: (1.) State the facts, the question presented and the court's decision in the above case.

Case No. 54. Jaffray v. Davis, 124 N. Y. 164.

Facts: Defendant owed plaintiff for goods sold, a debt of \$7,714.37, and in settlement thereof gave three promissory notes aggregating \$3,462.24, secured by a chattel mortgage, and the agreement was that this settlement should operate as a full discharge. The notes having been paid, plaintiff now sues for the balance on the theory that there was no consideration for its release.

Point Involved: Whether if a settlement in full be effected of an undisputed claim by a payment of less than the amount claimed, with something else done or given than the mere payment of money, the balance of the debt can be recovered.

POTTER, J.: (The Court after stating the point involved, then reviews many cases which show that where a debt is liquidated and not the subject of bona fide dispute, a payment of a less sum to discharge it will not operate as a complete discharge, though so received, but that if there be anything else than money given, as "a horse, hawk, or robe," the agreement will stand, or if some new security be given (as in the present case), the entire

debt will be discharged as agreed upon) and then the court continues):

“These cases show in a striking manner the extreme ingenuity and assiduity which the Courts have exercised to avoid the operation of the rigid and rather unreasonable rule of the old law * * * ‘technical and not very well supported by reason,’ or as may be more practically stated, a rule that ‘a bar of gold worth \$100 will discharge a debt of \$500, while 400 gold dollars in current coin will not.’ ”

“* * * The consideration of the new agreement (in the present case) was that the plaintiffs, in place of an open book account for goods sold, got the defendant’s promissory notes, probably negotiable in form, signed by defendant, * * * and got security upon all the defendant’s personal property for the payment of the sum specified in the notes, where before they had no security. * * *

“It seems to me * * * the transactions * * * constitute a bar to this action.”

Question 54: (1.) State the facts, the question presented and the court’s decision in the above case.

{(Note: It is everywhere the law that the acceptance by the creditor of some additional advantage, however slight, in addition to the payment of the part of the debt, is enough to make the full release given in return therefor effective.) See the language in the next case. Whether the giving by the debtor of his own negotiable paper, with no other advantage, is effective, is in question under the authorities. That it will sustain the settlement, see *Sard v. Rhodes* 1 Mees. & W. 183; *Wells v. Morrison*, 91 Ind. 51; *Listers, etc., Co. v. Pender*, 74 Md. 15; but the point has not been raised in many cases, and seems in many jurisdictions, especially in the case of a check, to be entitled to no weight. Thus in Case No. 53, *supra*, the fact that payment was by check is not considered.)

Case No. 55. *Melroy v. Kemmerer*, 218 Pa. 381, 11 L. R. A., new series, 1018.

Facts: The debtor being in failing circumstances,

offered his creditor 30 per cent of his debt as a payment in full, otherwise he would go through bankruptcy. The proposition was accepted and the 30 per cent paid. This is a suit for the balance.

Point Involved: Whether, if a creditor accepts less than his full debt in full satisfaction from a debtor who is on the verge of bankruptcy, who agrees to give that amount and avoid bankruptcy, there is a good discharge of the entire debt.

Review — MITCHELL, C. J.: "It was said in *Ebert v. Johns*, 206 Pa. 395, 55 Atl. 1064, that the rule that the acceptance of a smaller sum for a debt presently due, though agreed and expressed to be payment in full, is not a good accord and satisfaction, was a deduction of scholastic logic, and was always regarded as more logical than just, and hence any circumstance of variation is sufficient to take a case out of the rule. As illustrations of such circumstances of variation, it has been held that payment a day, or even an hour, before the debt is due, or at a different place, or of a certainty in amount where the amount of the debt is uncertain, or payment of even a part by a third person, or additional security of any kind, such as the indorsement of a note by a third person, or payment in chattels or anything other than money, will be a good discharge of the whole by way of accord and satisfaction. Note to *Cumber v. Wane*, 1 Smith, Lead. Cas. 357. And see a full collection of the more recent cases in the note to *Fuller v. Kemp*, in 20 L. R. A. 785. [The rule itself is founded on the want of consideration for the agreement.] As a part can never be equal to the whole, payment of a part of a debt presently due gives the creditor nothing that he was not entitled to, and deprives the debtor of nothing he was not bound to part with before, and therefore there is no consideration. The logic is unimpeachable, but it fails to take into consideration the practical importance of the difference between the right to a thing and the actual possession of it. As said in *Ebert v. Johns*, *supra*, 'To a merchant with a note coming due, \$5,000 before 3 o'clock today, which

will save his commercial credit, may well be worth more than \$20,000 tomorrow, after his note has gone to protest.' If the debt is not due till tomorrow, the payment of the lesser sum, under all the cases, will be a good accord and satisfaction; but if the debt was due yesterday, but the debtor can only pay part of it today, the benefit to the creditor of getting that part now, rather than the whole when it is too late, is just as great, and whatever conclusion the scholastic logic and theoretical reasoning may lead to, the importance of the practical result is a matter for the creditor to decide for himself, and, having so decided and got the benefit of it, justice and common honesty ought to hold him to his agreement. For this reason, the force of which is universally accepted, the courts, so far as they could without sacrifice of the maxim of *stare decisis*, have brought the law into closer accord with modern business principles.

"In the present case the debtor, being in failing circumstances and contemplating bankruptcy, offered the plaintiffs 30 per cent of his debt as a settlement in full. The plaintiffs dissuaded him from going into bankruptcy, accepted his alternative offer, received the money, and closed the account. They have now brought this suit for the balance. In the absence of any express decision in this state on this point, the learned judge below did not feel at liberty to depart from the general rule. We have no such hesitation. The exact point is whether the debtor's relinquishment of his intention to seek a discharge in bankruptcy, and his payment of 30 per cent instead, constitute a sufficient consideration to bind the creditor to the agreement. On that point we have no doubt. A valuable consideration may consist in some right, interest, or benefit to one party, or some loss, detriment, or responsibility resulting, actually or potentially, to the other. Bouvier's Law Dict. 'If there is any advantage to the creditor, the law will not weigh the adequacy of the consideration.' Fowler v. Smith, 153 Pa. 639, 25 Atl. 744. { The accord in this case was good on both branches. By it the creditors got a sum

certain, instead of the chances of an uncertain dividend in bankruptcy. On the other hand, the debtor assumed the responsibility of paying a sum certain, whether his assets were sufficient or not, and gave up his right to a release of his future assets, and to a discharge from his whole debt, without regard to the sufficiency of his present assets.)

“The decisions on this exact point in other states are not numerous, but the general trend is uniform to the result we have reached. In *Hinkley v. Arey*, 27 Me. 362, it was said by Tenney, J., ‘In this case the plaintiff was informed that the defendant contemplated taking the benefit of the bankrupt act, which was then in force. If this intention had been carried out, the plaintiff would lose the whole debt, beyond what he might receive as a dividend; and the latter, judging from his letter, he did not consider as very valuable. To save himself from a greater loss under the law, he agreed upon the terms of composition offered. The defendant, upon the agreement and payment to Hubbard, took no further steps to obtain relief under the bankrupt law.’ It was accordingly held that the accord and satisfaction were good. The same ruling was made in *Dawson v. Beall*, 68 Ga. 328. And in *Curtiss v. Martin*, 20 Ill. 557, 578; *Engbretson v. Seiberling*, 122 Iowa, 522, 64 L. R. A. 75, 101 Am. St. Rep. 279, 98 N. W. 319, and *Rice v. London & N. W. American Mortg. Co.*, 70 Minn. 77, 72 N. W. 826, the courts went still farther, and held the satisfaction valid where the debtor was insolvent or in failing circumstances, though there was no express intention to seek a discharge in bankruptcy. In the last-named case it was held that an agreement on behalf of the estate of a debtor supposed to be insolvent was good, though it turned out in fact that it was solvent. And in *Pettigrew Mach. Co. v. Harmon*, 45 Ark. 290, the principle that part payment by a third person makes the accord valid was held to govern, where the third person was one to whom the debtor had assigned his assets for the payment of his debts. On principle and

on authority, therefore, the agreement in the present case was binding; and, there being no dispute on the material facts, the defendant's sixth point, asking for binding instructions, should have been affirmed."

Question 55: What were the facts, the question presented and the decision of the court in the above case?

(Note: The exact question presented in this case has seldom been raised, and there are very few authorities on the point. See note to the above case in 11 Lawyer's Reports Annotated, New Series, on page 1024, citing as in accord with the above case, Engbretson v. Seiberling, 122 Iowa 522; Seegmiller v. Kelley, (Iowa) 99 N. W. 1131; Herman v. Schlesinger, 114 Wis. 382; Rice v. London & N. W. Am. Mort. Co., 70 Minn. 77. *Contra*, Beaver v. Fulp, 136 Ind. 595.)

Case No. 56. Bell v. Baxter, 86 N. Y. 195.

Facts: The debtor agreed with all his creditors, and they with each other, to accept a certain per cent in settlement of their claims.

Point Involved: Whether an agreement by a debtor with his creditors, and they with him and with each other, to accept a part of their debts in full settlement, is binding.

EARL, J.: " * * * An agreement to discharge the whole of a debt upon receiving payment of a portion is *nudum pactum* and not binding. But to this general rule there are some exceptions, one of which is a composition agreement, where the creditors agree to take a portion of their debts in satisfaction of the whole. In such a case the agreement of each creditor is said to furnish a consideration for the agreement of every other creditor who becomes a party to the composition agreement. Each creditor enters into a new agreement with the debtor, the consideration of which is the forbearance by all the other creditors who become parties to the composition to insist upon their claims in full. * * *

Question 56: What is a composition with creditors? Is it binding? Distinguish it from the case of a settlement by a debtor with his creditor.

A person or a number of person ^{agree to} may donate to an institution a certain sum; they may give their duly signed list the gifts cannot be collected. It is because they consider themselves trustees of these

Sec. 42. Compromise and Settlement.

Case No. 57. McKinley v. Watkins, 13 Ill. 140.

Facts: McKinley and Watkins traded horses. A month or two after the trade the horse which Watkins got died from an unsoundness that existed when the trade took place. It did not appear that McKinley was guilty of any deceit or that he made any warranty with respect to the horse being sound. Watkins complained to McKinley, and McKinley promised to give him \$50 or a \$50 horse if he would not sue. This suit was brought to recover such \$50. The trial court instructed the jury, "If the jury believe from the evidence that there was a horse trade between Watkins and McKinley, out of which a difficulty had grown, and that Watkins was threatening to sue McKinley, and not deceiving him by any misrepresentations, and that McKinley rather than be sued promised Watkins that he would pay him \$50, then said promise is binding, and this regardless of the question as to whether McKinley would or would not have been liable in the suit which Watkins was threatening to bring against him." The jury found for Watkins, and McKinley appeals.

Point Involved: Was the above instruction a good statement of the law?

TRUMBULL, JUSTICE: "* * * The only question in the case is as to the propriety of this instruction, and in one point of view it is clearly erroneous. It assumes that the defendant would be bound by his promise, whether assented to by the plaintiff or not. (Unless the plaintiff were bound on his part not to do the act which formed the consideration of the promise of the defendant, the agreement was void for want of mutuality.) The promise of defendant to pay \$50 if plaintiff would not sue him was incomplete till accepted by the plaintiff. Chitty on Contracts, 13.

"A mere offer, not assented to, constitutes no con-

promise regarding a doubtful claim is binding.

tract; for there must be not only a proposal, but an acceptance thereof. Story on Contracts, Par. 377, 378.

“The instruction in other respects is very nearly, if not quite, correct. It assumes that, in order to support the promise, there must have been a horse trade between the parties, out of which a difficulty had arisen, and the plaintiff was threatening to sue the defendant, and not deceiving him by any misrepresentations. If by this is to be understood that the plaintiff must in good faith have supposed that he had a good cause of action against the defendant, growing out of the horse trade, the instruction is strictly proper. It is immaterial whether the plaintiff could have recovered in such action or not. If he honestly supposed that he had a good cause of action, the compromise of such right was a sufficient consideration to uphold a contract fairly entered into between the parties, irrespective of the question as to who was in the right. It has often been decided that the compromise of a doubtful right is a ² sufficient consideration for a promise; and it is immaterial on whose side the right ultimately turns out to be, as it must always be on one side or the other, because there can be but one good right to the same thing. *Taylor v. Patrick*, 1 Bibb, 168; *Russel v. Cook*, 3 Hill, 504; *Moore v. Fitzwater*, 2 Rand. 442; *O’Keson v. Barclay*, 2 Penn. Rep. 531.

“If the plaintiff was threatening to sue on a claim which he knew was wholly unfounded, and which he was setting up as a mere pretense to extort money from the defendant, a contract founded on a promise not to sue in such a case would be utterly void. In order to support the promise there must be such a claim as to lay a reasonable ground for the defendant’s making the promise, and then it is immaterial on which side the right may ultimately prove to be. *Edwards v. Baugh*, 11 Mees. & Wels. Rep. 641; *Perkins v. Gay*, 3 Serg. & Rawle, 331. ²

“The judgment of the circuit court is reversed, and

the cause remanded for a new trial. Treat, C. J., dissented. Judgment reversed."

Question 57: (1.) State the facts, the question presented and the Court's decision in the above case.

(2.) Does it make any difference whether the dispute settled would, if not settled, have terminated in favor of the now defendant?

(3.) Suppose the plaintiff knew that his claim was wholly unfounded, would that change the result?

CHAPTER FIVE

LEGALITY OF CONTRACTS

- A. Legality of contract an essential element.
- B. Particular sorts of illegal agreements.
- C. The connection of the illegality with the agreement.
- D. Judicial remedies in illegal agreements.
- E. Contracts whose objects are partly legal, partly illegal.

A. Legality of Contract an Essential Element.

Sec. 43. Illegal Agreements Void.

(Note: As will appear from the following cases an agreement made to violate the law cannot be deemed a contract. Legality, then, we may look upon as an *essential element* in contract. It follows that illegal agreements are not contracts; yet it is often convenient, and certainly justified by usage, to use the term "illegal contracts." It has been suggested that contracts usually regarded as illegal agreements are divisible into two classes—those against public policy, but otherwise fair and moral, and those illegal because of a positive intent to do an illegal act. Thus, a contract in unreasonable restraint of trade is void, yet it is not illegal in the sense that it contemplates any commission of crime, and no matter howsoever closely interwoven with other covenants will in no way taint them. We may, however, for our purposes, group all such contracts under one heading, as illegal.

Contracts are usually illegal because of their illegal *object*. They may, however, be illegal not because of their character, but simply because in their *execution* the law is violated, the contract itself made with the same object under other circumstances being enforceable. Such are contracts made by one without a license required by law.)

B. Particular Classes of Illegal Agreements.

- (a) Contracts whose objects are in violation of law. formation is in violation of law.
 (b) Contracts the manner of whose

(a) Contracts Whose Objects Are in Violation of Law.

- (1) Contracts whose objects are against public policy or the common law. (2) Contracts whose objects are forbidden by statutory law.

(1) Contracts Whose Objects Are Against Public Policy or the Common Law.

- § 44. Contracts in restraint of trade and to create monopoly. § 46. Contracts tending to corrupt the public service.
 § 45. Contracts in restraint of marriage. § 47. Contracts against morality in general.

Sec. 44. Contracts in Restraint of Trade and to Create Monopoly.

Case No. 58. *Diamond Match Co. v. Roeber*, 106 N. Y. 473.

Facts: Roeber sold his match factory in New York to a corporation whose rights the Diamond Match Company acquired by assignment. He covenanted as a part of his contract not to manufacture or sell matches anywhere in the United States, except Nevada and Montana. When this contract was made, the match company was engaged in manufacturing matches in several states, and selling them throughout the United States. Roeber, after this contract, went into the employ of his vendee, remaining with the company several years. He then became superintendent of a rival concern and also opened up a match store. This was a suit for an injunction against him.

Point Involved: Is a contract in restraint of trade valid? This question being affirmatively answered with qualification that the restraint must be reasonable, what restraint is reasonable?

ANDREWS, J., delivered the opinion of the Court:
 “* * * The defendant for his main defense relies

upon the ancient doctrine of the common law * * *
 that a bond in general restraint of trade is void. * * *
 The tendency of recent adjudications is marked in the
 direction of relaxing the rigor of the doctrine that all
 contracts in general restraint of trade are void irre-
 spective of special circumstances.

“The law has for centuries permitted contracts in partial restraint of trade, when reasonable, and in *Homer v. Graves* (7 Bing. 735), Chief Justice Tindall considered a true test to be ‘whether the restraint is such only as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public.’ * * *

“In the present state of the authorities, we think it cannot be said that the early doctrine that contracts in general restraint of trade are void, without regard to circumstances, has been abrogated. But it is manifest that it has been much weakened and that the formation upon which it was originally placed has, to a considerable extent at least, by the change of circumstances, been removed.

“The covenant in the present case is partial and not general. It is practically unlimited as to time, but this under the authorities is not an objection if the contract is otherwise good. It is limited in space. * * *

“We are of the opinion that the covenant, being supported by a good consideration, and constituting a partial and not a general restraint, and being, in view of all the circumstances disclosed, reasonable, is valid and not void. * * *

Question 58: (1.) What was the extent of the business of the covenantee in the above case? What was the agreement of the covenantor? What was the relief asked for in the present suit? Did the Court grant it?

(2.) What was the ancient doctrine of the common law respecting agreements in restraint of trade?

(3.) What is the test as to whether the restraint imposed is reasonable?

(4.) Is it any objection that the restraint is unlimited in respect to time?

(5.) Do you think any restraint of trade would be good if it were totally unlimited in respect to space?

(6.) Suppose the present agreement had covered the entire United States, do you think it would have been enforceable?

(7.) If a contract in restraint of trade is unreasonable in respect to the space covered, would the courts enforce it over a reasonable area?

(Note to Case Fifty-eight: The question presented in Case Fifty-six is one that has occasioned much divergence of authority. All courts agree that a contract in *unreasonable* restraint of trade is void. But whether it is reasonable does not depend alone on what is necessary to protect its purchaser. The public interests are also to be considered. Accordingly some courts hold that while a covenant in restraint of trade involving special skill and knowledge may cover (if reasonable) a city, a county, or several counties, it cannot cover the entire state. Thus, *Lanzit v. Mfg. Co.*, 184 Ill. 326.)

Case No. 59. *Moore v. Bennett*, 140 Ill. 69.

Facts: Moore and others sued Bennett and others for damages resulting from a breach of contract. The parties were court reporters and formed a combination to control prices, establishing certain rates. Bennett and others cut these rates and underbid the other members of the association. This is a suit on account of such breach.

Point Involved: Whether a combination to destroy competition and arbitrarily keep up prices is valid.

MR. JUSTICE BAILEY: "Whatever may be the proposed objects of the Association it clearly appears, * * * that one of its objects, if not its leading object, is to control the prices to be charged by its members for stenographic work, by restraining all competition between them. * * *

"While some of the cases cited involve elements not present here, the determining circumstances in all of them seem to have been a combination or conspiracy

among a number of persons engaged in a particular business, to stifle or prevent competition and thereby to enhance or diminish prices to a point above or below what they would have been if left to the influence of unrestricted competition. All such combinations are held to be contrary to public policy and the courts therefore will refuse to lend their aid to the enforcement of the contracts by which such combinations are sought to be effected. * * * * *

Question 59: (1.) State the facts, the question presented and the Court's decision in the above case.

(2.) Would you distinguish the above case from a union of laborers to bring about an increase of wages?

Case No. 60. The Distilling & Cattle Feeding Co. v. People, 156 Ill. 448.

Facts: This was a quo warranto proceeding brought by the Attorney General against the Distilling and Cattle Feeding Co., alleging that it existed by reason of an agreement for the creation of a monopolistic trust entered into and composed by various corporations and individuals for the purpose of stifling competition and creating monopoly. The proceeding was brought for the purpose of dissolving the said trust on the ground that it was illegal.

Point Involved: Is a combination for purposes of monopoly illegal?

MR. JUSTICE BAILEY: "There can be no doubt, we think, that the Distillers' and Cattle Feeders' Trust, which preceded the incorporation of the defendant, was an organization which contravened well-established principles of public policy, and that it was, therefore, illegal. No one who intelligently considers the scheme of this trust, as detailed in the information, can for a moment doubt that it was designed to be, and was in fact, a combination in restraint of trade, and that it was organized for the purpose of getting control of the manufacture and sale of all distillery products, so as to stifle competition, and to be able to dictate the amount to be

by what warrant?
(are you in position of your particular power off etc.)
Proceeding to test legality of conduct of a person or corporation
Holding Co.

* * Rules has been relaxed of late. Clayton act has changed status of comb. of labor under restraint of trade.

manufactured and the price at which the same should be sold, and thus to create, or tend to create, a virtual monopoly in the manufacture and sale of products of that character. No other business principles can be suggested upon which the development of such an elaborate and far-reaching scheme can be accounted for. No rational purpose for such organization can be shown consistent with an intention to allow business to run in its normal channels, to give competition its legitimate operation, and to allow both production and prices to be controlled by the natural influence of supply and demand, and the results, as shown by the information, were such as might be anticipated. The trust obtained possession of nearly all the distilleries and of nearly the entire distillery product of the United States, thus enabling it to dictate prices and the amount of production, and to thus draw to itself the substantial control of the distillery business of the country.

Holding Co.

“Combinations of this character have been frequently made the subject of judicial investigation within the last few years, and while the proceeding has most generally been against some one of the corporations entering into the trust, the courts, so far as they have had occasion to speak on the subject at all, have held such trusts to be illegal.”

Question 60: (1.) What was the purpose of the above suit? By whom was it brought? What was the object of the combination involved? What did the Court say with reference to the legality of such combinations?

(2.) What is the nature of monopoly? Suppose an automobile manufacturer by his skill, industry and integrity virtually secures the market for the class of cars he sells, has he a monopoly? Distinguish between such a case and the above case.

Sec. 45. Agreements in Restraint of Marriage.

Case No. 61. *Sterling v. Sinnickson*, 5 N. J. L. 756.

Facts: Suit was brought on the following instrument: “I, S. N., am hereby bound to B. S. for the sum of \$1,000, provided he is not lawfully married in the course of 6

months from the date hereof. Witness my hand and seal. Burlington, May 16, 1816. (Signed) S. N. (Seal.)”

Point Involved: Whether a contract whose tendency is to restrain freedom of marriage is binding.

KIRKPATRICK, C. J., delivered the opinion of the Court: “* * * The contract was not only useless and nugatory, but it was contrary to public policy.

“Marriage lies at the foundation, not only of individual happiness, but also of the prosperity, if not the very existence, of the social state; and the law, therefore, frowns upon, and removes out of the way, every rash and unreasonable restraint upon it, whether by way of penalty or inducement. * * * A bond * * * to marry, if there be no obligation on the other side, no mutual promise, or a bond not to marry, are equally against the law. They are both restraints upon the freedom and choice and of action in a case where the law wills that all shall be free. * * *”

Question 61: (1.) State the point involved in the above case, how it arose, and the Court’s decision. /

(2.) Why are contracts in restraint of marriage, void?

(Note: Contracts in restraint of the freedom of marriage are generally held void. It is held, however, that one may devise or bequeath property on condition that his wife do not marry again.)

Sec. 46. Contracts Tending to Corrupt the Public Service.

Case No. 62. Mills v. Mills, 40 N. Y. 543.

Facts: A contracted with B “that he would give all the aid in his power and spend such reasonable time as may be necessary, and generally use his utmost influence and exertions to procure the passage into a law of the said bill heretofore introduced into the senate, etc.” He now sues for his fees. Defense, that the agreement was illegal.

Point Involved: Whether an agreement to use influence and to exert one’s self to secure the passage of a

particular law in behalf of private interests is against public policy.

HUNT, C. J., delivered the opinion of the Court:
 “* * * It is not suggested that the plaintiff was a professional man whose calling it was to address legislative committees. It is not suggested he had any claims of right, which he proposed to advocate. * * * To procure the passage of such a law for the benefit of the defendant he undertook to use his utmost influence and exertions. This contract is void as against public policy. It is a contract leading to secret, improper and corrupt tampering with legislative action. * * * It is not necessary to adjudge that the parties stipulated for corrupt action, or that they intended that secret and improper resort should be had. It is enough that the contract tends directly to those results. It furnishes a temptation to plaintiff to resort to corrupt means or improper devices to influence legislative action. * * *”

Question 62: (1.) What was the nature of the agreement on which the above case is based? What did the Court hold?

(2.) Suppose in the above case the party employed had firmly believed in the merits of the law proposed, would this make any difference?

(3.) The business men of a certain city compose an Association of Commerce. One of the objects of the association is to procure the passage of laws which the members of the association regard as beneficial to commerce. They employ A, an attorney, to draft bills for introduction into the legislature and to appear before committees and argue in behalf of such proposed measures. A, having performed such services, sues for his salary. Can he recover? Why?

Case No. 63. Kansas City Paper House v. Foley Rwy. Print Co., 85 Kan. 678, 39 L. R A, new series, 747.

Facts: The K. C. Paper House sued the Foley Rwy. Printing Co. upon a promissory note. The defendant claimed a credit of \$500, which it claimed the plaintiff owed Foley, the President of the defendant, and which such President had transferred to it. The only question

Legislators of Ill. made a contract between a candidate for office and a supporter to the effect that if the candidate is elected his supporter will be appointed to some office.

involved was the validity of this \$500 credit. The contract upon which Foley claimed this credit was made by the plaintiff company with Foley, under which Foley was to sell paper and other material to the state, the evidence going to show that his compensation was to be contingent upon his success.

Point Involved: The legality of contracts of agency by which the agent is to sell goods to a public body, his compensation depending on his success.

MASON, J.: “* * * There was some evidence that the contract contemplated a payment for the exertion of personal and political influence upon members of the executive council, and that the services rendered were of that character. If that was the case, the contract was, of course, void. But there was also testimony that Foley was employed simply as an ordinary salesman, because of his experience in using and buying paper and other material handled by the plaintiff, and that his efforts were in accordance with that employment, and were confined to exhibiting samples and “talking up” the goods and the responsibility of the house. If that was the case the contract was valid. In this aspect the question is merely one of fact to be decided by a tribunal which sees and hears the evidence (the court below).”

“The evidence suggested, but perhaps did not absolutely determine, that Foley’s compensation was to be contingent upon the procuring of the state contract. There is a conflict of judicial opinion as to whether that circumstance should stamp the contract as illegal.

* * *

(Here the Court reviews certain cases holding such contracts on commission illegal, but distinguishes such cases by showing that they involve some additional element, such as personal and corrupt influence with the members of the governmental body.)

“The fact that the compensation of a salesman, employed to sell goods to the public, depends upon his success may tend to show a purpose to use illegal means, or a probability that such means will be used; but we

do not think that it should be regarded as conclusive in either point, nor that in and of itself it should be deemed to characterize the employment as illegal. (Citing authorities.) * * * Many of the cases in these collections involve contracts for influencing legislation, which are not entirely analogous to those for the sale of goods, and may well be regarded as subject to a more stringent rule. * * *

Question 63: (1.) State the facts, the point involved and the Court's decision in the above case.

(2.) What element would render such a contract illegal?

(3.) The Court says that contracts to procure legislation are subject to a more stringent rule than contracts to secure the sale of goods to the government. Why?

Sec. 47. Contracts Against Public Policy in General.

Case No. 64. *Wilson v. Carnley* (1908), 1 K. B. 729, 1 British Ruling Cases, 901.

Facts: Plaintiff's suit is for a breach of promise of marriage made by defendant. Defendant was at the time a married man and plaintiff knew it. The defendant's wife having died, the defendant refuses to carry out his agreement to marry plaintiff, and plaintiff sues.

Point Involved: Whether a promise of a married man, known to be married by the promisee, to marry another woman upon becoming qualified to do so, is enforceable.

VAUGHAN WILLIAMS, L. J.: “* * * I have no doubt that this was a contract which had a tendency to make the defendant, who, in the lifetime of his wife, had promised to marry another woman, do something which was in contravention of the obligations which are recognized in this country as owing from a husband to his wife. <It is sufficient to say that this is obviously a contract which a husband in his wife's lifetime could not enter into without being disloyal to his wife.> When the plaintiff's counsel during the argument, in mitigation, I think, of the husband's conduct, adverted to the

fact that at the time when the contract was made the husband and the plaintiff both thought that the wife was going to die soon, I could not help feeling that such a contract as this might make the wish the father to the thought. But, however that may be, it is a contract against public policy, as tending to make the husband disregard the acknowledged rules of morality as to married life, and therefore cannot be enforced. * * *

Question 64: Why should the above agreement be deemed illegal?

(2) Contracts Whose Objects Are Forbidden by Statutory Law.

§ 48. Wager agreements.

§ 49. Usurious agreements.

Sec. 48. Wager Agreements.

Case No. 65. Bernard v. Taylor, 23 Oregon, 416.

Facts: Suit by Bernard to recover from a stakeholder the sum of \$650 deposited by Bernard as a wager on the outcome of a footrace, and demanded by him of the stakeholder before the race was run.

Point Involved: Whether a wagering agreement is valid. Whether the court will relieve one from the consequences of his illegal agreement.

LORD, C. J.: “* * * The first contention for the defendant is that wagers or wagering contracts upon indifferent subjects are valid in this state, by force of the common law, except when prohibited by statute. There can be no doubt that <wager contracts upon indifferent matters were valid at common law.> * * * <But all wagers that tended to a breach of the peace, or to injure the feelings, character or interests of third persons, or which were against the principles of morality or of sound policy, were void at common law.> * * * <And all wagers in contravention of the positive provisions of any statute are also void.> Of late years by legislation and judicial decision the hostility to wagers of every

nature has been marked. This is doubtless due to the increase of betting and the evil consequences resulting therefrom. * * *

(The court allowed the recovery of the money from the stakeholder on the ground that the suit was to rescind an illegal agreement from which plaintiff attempted to withdraw while it was entirely executory on the other side. See Subdivision D, *post*, for a discussion of this principle.)

Question 65: Were wagers illegal by the common law? What is the law now? If one deposits money for wagering purposes with a stakeholder, can he recover it back if he demands it before the money is paid over to the other party by the stakeholder?*

Case No. 66. Pope v. Hanke, 155 Ill. 617.

Facts: Suit on notes. Defense, that they were given in settlement of a gambling transaction, consisting in a speculation on the future price of grain. The court found that the transaction consisted in the form of contracts for the future sale and delivery of grain, but with the understanding that no grain was to be called for or delivered, but a settlement was to be effected between the parties on the basis of the difference between the contract rate and the market price on the day of delivery.

Point Involved: Whether an agreement in form of a sale of property, but in spirit a speculation on the future price of such property, is valid.

MR. JUSTICE MAGRUDER delivered the opinion of the Court: “* * * <The transactions * * * were mere speculations upon the future prices of grain. The contracts for the delivery and sale of grain in the future were not made with the intention that any grain should be received or delivered, but with the understanding that each transaction should be settled by the payment of the difference between the contract price and the market price at the time fixed. It is well settled that all such contracts are mere wagers or gambling contracts and are void, * * * Such is the law of Missouri where the notes sued on are admitted to have been executed. * * * In Crawford v. Spencer, 92 Mo. 498, the Supreme Court

No, not even if the bet is decided. ~~Courts~~ leave party where they stand.
Legislative statutes, however, may provide that money may be recovered by the loser

of Missouri said: 'The law is now settled that a sale of goods to be delivered in the future is valid—though there is an option as to the time of delivery and though the seller has no other means of getting them than to go into the market and buy them; but if under the guise of such a contract, valid on its face, the real purpose and intention of the parties is merely to speculate on the rise or fall of prices, and the goods are not to be delivered, but the difference between the contract and market price only paid, then the transaction is a wager and the contract is void.' > Such also is the law in Illinois, where the present suit has been brought. * * *

< 'This intention (merely to speculate) may be established not merely by the assertions of the parties, but by all the attending circumstances. > (Defendant) had a mill at Trenton, but its capacity was only 200,000 bushels per annum; and yet * * * the volume of transactions between the parties * * * amounted, in a period of a little more than three months, to 2,190,000 bushels of wheat, 1,240,000 bushels of corn, and 60,000 bushels of oats. * * * The question of intention is a question for the jury, to be determined by a consideration of all the evidence. * * * "

Question 66: (1.) State the facts, the question presented and the opinion of the Court in the above case.

(2.) Is a sale of goods which are to be acquired by the seller in the future, valid?

(3.) If the parties honestly contemplate a sale at the time of the agreement, do you think it would be illegal for them to agree at the time of the delivery, to settle by the payment of money?

Sec. 49. Usurious Agreements.

Case No. 67. In Re Fishel, 192 Fed. 412.

Facts: Proceedings in bankruptcy. In question, whether certain loans made to the bankrupts were usurious. The contract governing the loan called for interest on the money loaned and commissions on collateral.

"Contemporaneous construction, evidenced by the actions of the contracting parties before breach, shows the discount company in the exact position of a lender on collateral with legal title to the same, in effect a chattel mortgage, charging by agreement before loan 6 per cent. on the loan and 5 per cent. on the face of the collateral, equivalent on a 90-day accommodation to over 25 per cent per annum." The loan is governed by the laws of New York, which is stated in the opinion.

Point Involved: The character of usury and the penalty therefor under the laws of New York.

HOUGH, J.: "* * * Section 373 of the general business law (Consol. Laws 1909, c. 20) declares that:

" 'All * * * contracts or securities * * * all deposits of goods or other things * * * whereupon or whereby there shall be reserved or taken, or secured or agreed to be reserved or taken any greater sum * * * or value, for the loan * * * of any money (than six per cent. per annum) shall be void.' "

"Language could not be broader or more plain; and, under it, courts are bound to inquire whether by any device, however circuitous, or under any name, however fair in sound, a borrower is surrendering and a lender exacting more for the use of money than an equivalent of the legal rate of interest, whether paid in money or otherwise.

"Considering the attitude of most states and countries on this subject, the New York act seems archaic, but that can make no difference in the duty of courts. Since, however, in order to reveal usury, it may be necessary by oral evidence to prove the falsity of paper contracts fair and legal on their face, experience has shown that the statute contains a temptation to ras-
cally borrowers to avoid payment of just debts by offer-
ing usury as a defense. On this knowledge of human weakness are founded certain rules of decision—judge made, but long since established beyond cavil.

"Thus the burden is on him who alleges usury to

prove it by clear and satisfactory evidence—the offense is largely one of intent—and the unlawful usance must be given and retained in pursuance of an agreement, mutual and existing at the inception of the transaction. *Rosenstein v. Fox*, 150 N. Y. 354, 44 N. E. 1027, and cases cited.

“It also happens not infrequently that the lender does more than merely hire out his money, and for such additional service he is entitled to be paid, if the service be actual, and whatever objection there may be to his rate of charge, it cannot be based upon the usury statute, unless the whole transaction is plainly but a cover for unlawful lending. *Re Wilde’s Sons* (D. C.), 133 Fed. 562, and cases cited.

“But if, when all the evidence and explanations have been considered, it clearly appears that all the lender did or expected to do was to loan, and all the borrower got or expected to get was money, then any word or phrase, any collateral or contemporaneous agreement by virtue of which more than the amount of the lawful rate flows into the pockets of the lender, must and should be swept aside, and the intended and agreed upon usury denounced. See especially *Heidenheimer v. Mayer*, 42 N. Y. Super. Ct. 506, affirmed 74 N. Y. 607.”

Question 67: (1.) What is usury?

(2.) What is the penalty under the laws of New York?

(3.) Can a lender charge a “commission” on his own money where the per cent is thus with the interest raised to more than the legal rate?

(Note on Case 66: The laws of usury differ widely in the different states. The contract rate and the penalty varies, but in most states the usury does not make the principal unrecoverable but either causes (1) a loss of the excess interest, or (2) a loss of all interest; or (3) a loss of all interest and some portion of the principal.)

(b) Contracts Legal in Their Objects, but Illegal by the Manner of Their Formation.

§ 50. Agreements made on Sunday. § 51. Agreements made by un-licensed parties.

Sec. 50. Agreements Made on Sunday.

Case No. 68. Richmond v. Moore, 107 Ill. 429.

Facts: This was a contract of employment for service alleged to have been broken. Damages were asked for such breach. *Defense:* That the supposed contract was void, being made on Sunday.

Point Involved: Whether a contract made on Sunday is illegal.

MR. JUSTICE WALKER delivered the opinion of the Court: "The common law did not prohibit the making of such contracts. In *Drury v. Deputaire*, Taunt. 136, Lord Manfield * * * said: 'It does not appear that the common law ever considered these contracts as void which were made on Sunday.' Judgment was accordingly given for the price of a horse sold on that day. * * * The doctrine that contracts made on Sunday are void depends, therefore, alone on statutory enactments, and in various states of the Union the statutes vary in language or substance. * * *

"The 29th Car. II, Chap. 257, seems to be the basis of the various enactments of the Union. It is this: 'That no tradesman, artificer, workman, laborer, or other person whatsoever, shall do or exercise any worldly labor, business or work on the Lord's day.' It contains exceptions of which are works of necessity or charity. * * * The offense by that statute is the performance of labor or business, and by ours it is the disturbance of the peace and good order of society.'" (The Court holds the Illinois statute to be a more liberal statute than the English statute, and decided that the above contract is enforceable. In many states, however, the statute is a virtual adoption in its strictness of the British statute.)

Question 68: (1.) What were the facts, the question presented and the Court's decision in the above case?

(2.) What contracts made or to be performed on Sunday are valid in every jurisdiction?

A note or check made payable on Sunday is simply thrown forward one day;

Sec. 51. Agreements Made Without Required License.

Case No. 69. Buckley v. Humason, 50 Minnesota, 195.

Facts: Defendants sold to Augustus K. Barnum certain leasehold property, situated in Chicago, called the Ogden Flats, in exchange for property in St. Paul, valued at \$175,000. Plaintiff Buckley was employed by defendants as their broker at Chicago, and he there procured the purchaser and acted as their agent in the transaction. This suit is for \$4,375 commission for his services. An ordinance was in force in the City of Chicago, that it should be unlawful for any person to exercise within the city the business of real estate broker without a license, and provided the amount to be paid, and subjected violators to a pecuniary penalty for each violation. Plaintiff had no such license during the negotiation and exchange.

Point Involved: Whether one who is engaged without a license in a business in which the government requires a license for purposes of regulation can recover his fees under agreements made by him while so unlicensed.

VANDERBURGH, J.: “* * * The particular transaction in question was therefore in violation of law, unless he was duly licensed, which was not shown. On the contrary, the answer alleges, and it stands admitted, for want of a reply, that the plaintiff was not duly licensed as a broker. The plaintiff cannot, therefore, recover his commissions. *Hustis v. Pickands*, 27 Ill. Ap. 270; *Johnson v. Hulings*, 103 Pa. St. 501; *Holt v. Green*, 73 Pa. St. 198.

“Business transactions in violation of law cannot be made the foundation of a valid contract; and the general rule is that where a statute makes a particular business unlawful generally, or for unlicensed persons, any contract made in such business by one not authorized is void. * * *”

Question 69: What were the facts, the question presented and the Court's decision in the above case?

(Note: The above decision is in line with the weight of authority. See *Ames v. Gilman*, 51 Mass. 239 (unlicensed attorney at law cannot recover fees); *Deaton v. Lawson*, 40 Wash. 486, 2 L. R. A. N. S. 392 (unlicensed physician cannot recover fees); *Levison v. Boas*, 150 Cal. 185, 12 L. R. A. N. S. 575 (unlicensed pawnbroker cannot claim fees or lien on pledges). It is brought out by the cases on this subject that where there is a law penalizing an act it impliedly prohibits it, and contracts based thereon are void.)

C. The Connection of the Illegality With the Agreement.

- | | |
|---|--|
| § 52. Knowledge by one party that other party intends illegal consequences. | § 53. Knowledge by one party accompanied by encouragement or assistance to the other to carry out illegal purpose. |
|---|--|

Sec. 52. Knowledge by One Party that Other Party Intends Illegal Consequences.

- | | |
|--|---|
| (a) Knowledge of the other's intent to commit offense of lesser magnitude. | (b) Knowledge of the other's intent to commit offense of greater magnitude. |
|--|---|

(a) Knowledge of the Other's Intent to Commit Offense of Lesser Magnitude.

Case No. 70. *Graves v. Johnson*, 179 Mass. 53.

Facts: A sold liquors to B, knowing that B intended to resell contrary to law, but he was wholly indifferent what use B made of the liquors. This is a suit for the price of such liquors.

Point Involved: Whether a contract in other respects fully in compliance with law is ^{not} rendered illegal merely because one of the parties thereto, otherwise not in fault, knows that the other intends to make use of the results of the contract to commit a crime of lesser magnitude.

HOLMES, C. J., delivered the opinion of the Court:
 “* * * In our opinion a sale otherwise lawful is not connected with subsequent unlawful conduct by the mere

fact that the seller correctly divines the buyer's unlawful intent closely enough to make the sale unlawful. * * *
 The defendant (B) was free to change his mind, and
there was no communicated desire of the plaintiff's to
co-operate with the defendant's present intent. * * *"

Question 70: (1.) State the facts, the question presented and the decision of the Court in the above entitled case.

(2.) A, owning a house, leases it to B, knowing that B intends to use it for illegal or immoral purposes, but he does nothing to encourage or assist such illegal purpose, and is indifferent what use B makes of the premises. Is the lease void? Can A recover the rent?

(Note: Answer to Question (2.). On this point there is some conflict of authority. See the late cases of *Ashford v. Mace*, — Ark. —, 39 L. R. A. N. S. 1104, and *Harbison v. Shirley*, 139 Iowa, 605, 19 L. R. A. N. S. 662, holding that the landlord's knowledge, if there is no connivance of any sort, will not make the lease void. The first case bases its decision on the ground that uses of premises for gambling and bawdy house purposes are classed as offenses of lesser magnitude within the distinctions taken by the cases. But many courts hold such leases void. There would seem to be a distinction between a sale of goods in which the vendor parts with all property and control and a rental of premises of which he remains the landlord. See *Fields v. Brown*, 188 Ill. 111. The subject is governed by statute in some states.)

(b) Knowledge of the Other's Intent to Commit Offense of Greater Magnitude.

Case No. 71. *Hanauer v. Doane*, 12 Wall. 342.

Facts: Suit to recover the price of supplies and commissary stores for the Confederate army. Defense, illegality. The lower court instructed the jury that the seller's knowledge of defendant's purpose was immaterial. Appeal.

Point Involved: Whether a contract in other respects fully in compliance with law is rendered illegal merely because one of the parties thereto, otherwise not in fault, knows that the other intends to make use of the results

*felony - crime punishable by imprisonment.
 accessory to a crime will be charged against
 one who knows that another is going to do a crime*

of the contract to commit a crime of "greater magnitude."

MR. JUSTICE BRADLEY delivered the opinion of the Court: " * * * In this instruction we think the judge erred. With whatever impunity a man may lend money or sells goods to another who he knows intends to devote them to a use * * * of inferior criminality, he cannot do it * * * when he knows or has every reason to believe that such money or goods are to be used for the perpetration of a heinous crime, and that they were procured for that purpose. * * * Can a man furnish another with the means of committing murder or any abominable crime, knowing that the purchaser procures them and intends to use them for that purpose and then pretend that he is not a participator in the guilt? Can he wrap himself up in his own selfishness and heartlessness and say, 'What business is that of mine? Am I the keeper of another man's conscience?' No one can hesitate to say that such a man * * * is almost, if not quite, as guilty as the principal offender.

"No crime is greater than treason. * * *"

Question 71: State the facts, the question presented and the decision of the Court in the above case.

Sec. 53. Knowledge by One Party Accompanied by Encouragement or Assistance to the Other to Carry Out Illegal Purpose.

Case No. 72. Kohn v. Melcher, 43 Fed. R. 641.

Facts: K. & A. were wholesale liquor dealers at Rock Island, Illinois. M. was a druggist at Atlantic, Iowa, holding a permit to sell spiritous liquors for medicinal purposes. Under cover of this permit and in violation of law, M. was virtually engaged in a saloon business, obtaining his liquor from K. & A. M. was required to make monthly statements to the authorities, and in these he falsified the amounts of his sales and profits. K. & A. knew of M.'s illegal practices, and in order to aid him

in the same furnished him from time to time two sets of invoices, one showing the true purchase price, and the other, which he might show to the authorities, a higher, fictitious price. They also shipped a part of the liquors to M. under a fictitious name, and also enclosed a part of the liquors in boxes and barrels, labeling them as containing hardware, crockery, etc. K. & A. bring suit. Defense, illegality.

Point Involved: Whether a contract that would otherwise be legal is rendered illegal by the purpose of one party to make an illegal use thereof, accompanied with an encouragement or connivance in such illegal use by the other party.

SHIRAS, J., delivered the opinion of the Court: "To recover the balance due from defendant and resulting from transactions of the nature indicated, the plaintiffs now ask the aid of this Court:

"It is refused. * * *

"The statute of Iowa expressly forbids a registered pharmacist from selling intoxicating liquors as beverages. * * * The plaintiffs and defendant combined together to evade this statute, resorting to fraud and perjury to accomplish that purpose. * * * The ground upon which the plaintiff's right of action for the liquors sold is defeated is that the plaintiffs sold the liquors to the defendant, * * * well knowing that the statute of Iowa * * * forbade such pharmacist from selling intoxicating liquors as a beverage, and in order to aid defendant in evading the statute they forwarded the liquors in concealed packages, to a fictitious consignee, and furnished false invoices as a protection to defendant in making the false statement sworn to by him, thus actively aiding defendant in the commission of perjury as well as in other violations of law. * * *

Ground for decision

"The conclusion reached is that plaintiffs cannot maintain their action."

Question 72: State the facts, the question presented and the Court's decision in the above case.

D. Judicial Remedies in Illegal Agreements.

- (a) No remedy by way of enforcement. (b) Judicial rescission of illegal agreement.

(a) No Remedy by Way of Enforcement.

Sec. 54. Courts Will Not Enforce an Illegal Agreement. ('Ex Turpi Contractu non Oritur Actio.')

Case No. 73. Goodrich v. Tenney, 144 Ill. 422.

Facts: Suit brought to enforce an accounting for and payment of money alleged to have been earned by services performed under a contract found by the court to have been made for an illegal purpose.

Point Involved: Whether the Court will enforce an illegal agreement.

MR. JUSTICE SHOPE: “* * * Courts of Justice will not enforce the execution of illegal contracts, nor aid in the division of profits of an illegal transaction between associates. Neustadt v. Hall, 58 Ill. 172: It is there said, ‘In the language of Lord Ellenborough, we will not assist an illegal transaction in any respect; we leave the matter as we find it. * * *’ It may be insisted that it is unjust as between the parties for Tenney to raise the question, and very dishonest * * * for him to take advantage of it, but the contract being illegal, no rights can be enforced under it. * * * The maxim, ‘*ex turpi contractu non oritur actio*’ (out of an illegal contract no action arises), applies in all such cases, and neither party if in *pari delicto* (in equal guilt) can have assistance in courts of justice in enforcing the contract. And the objection may be made by a party in *pari delicto*, for the defense is not allowed because the party raising the objection is entitled to the relief, but upon principles of public policy and to conserve the public welfare. * * *”

(2) *Question 73:* Why will the Court allow one party to an

illegal agreement to set up the illegality to prevent the enforcement of the contract? *See. 5*

(b) Judicial Rescission of Illegal Agreement.

§ 55. General rule no relief of any sort granted.

§ 56. Exception to rule, where parties not in *pari delicto*.

§ 57. Exception to rule where the defendant's contract is entirely executory.

§ 58. Exception to rule by statute.

Sec. 55. General Rule No Relief of Any Sort. ("Allegans Suam Turpitudinem non est Audiendus.")

Case No. 74. Chapman v. Haley, 80 S. W. (Ky.) 190. ?

Facts: Suit by Haley to recover of Chapman \$300 alleged to have been paid to Chapman for investment purposes. The evidence disclosed that Chapman agreed with Haley that if Haley would pay him \$300, he would sell him \$3,000 in "good" money, that the parties met in a small room in Cincinnati to carry out the agreement; that Haley paid Chapman the \$300 and Chapman went out to get the \$3,000 promising to return in a few minutes, but that he did not come back. Haley testified that he thought the \$3,000 was all right, except that he understood there was something wrong about the numbers. But the court says "that appellee [Haley] fully understood that under the contract he was to purchase counterfeit money, cannot be doubted."

Point Involved: Whether the court will lend its aid to compel repayment of money (or surrender of any property) parted with under an illegal agreement not performed by the other side.

BARKER, J.: "* * * It is unnecessary to say that this conspiracy between these two men to purchase counterfeit money constituted an illegal contract and was void. * * * The question as to whether or not appellee who was equally guilty with appellant, can recover the money paid by him in pursuance of this criminal conspiracy, is the first question for adjudication?

"In the case of Kimbrough v. Lane, 11 Bush, 556, the

contract was for the payment of \$3,000 to secure the dismissal of an indictment against Lane for a felony. In affirming a judgment dismissing the petition in the action wherein it was sought to recover the \$3,000, this court said: 'It is sufficient to say on this point that the rule of law inhibiting such contracts was not made for the benefit of the obligors. The courts will not enforce such contracts because they are levelled at the safety and repose of society. * * * If money is paid upon such a contract, the courts will not aid in recovering it back. They will leave both parties in the exact position in which they have placed themselves.' "

Marion in
Rule.

Question 74: (1.) State the facts in the above case and the rule applied.

(2.) A desired to open up a place of business as a pool room and for bookmaking purposes. The object of his business was forbidden by ordinance, but the public authorities in violation of such ordinance were accustomed to grant licenses. A paid \$500 for such a license for one year, which was granted him. He then began the illegal business. The authorities thereupon closed it up. He sues to recover the money. Can he recover? Why?

(3.) A being desirous of procuring the office of clerk of a police court sent \$20 to B asking B in consideration thereof to use his influence to get A nominated. B used the money to defeat A's nomination. A sues to recover the money. What result? (*Liness v. Hesing*, 44 Ill. 113.)

Sec. 56. Exception to Rule Where Parties Not in *Pari Delicto*.

Case No. 75. *Duval v. Wellman*, 124 N. Y. 156.

Facts: Plaintiff sues as assignee of Mrs. E. Guion, a widow, "who in her search for a husband sought the advice and aid of the defendant, who was the owner and publisher of a matrimonial journal called 'The New York Cupid' and the proprietor of a matrimonial bureau in New York City." Mrs. Guion testified that she paid defendant \$5.00 as a registration fee and later \$50 under an agreement that it was to be returned to her if no husband

were found, but that \$50 additional was to be paid if she married any gentleman introduced by defendant. Later, Mrs. Guion, finding no one satisfactory among those introduced to her demanded back her \$50, which was refused. Suit to recover such \$50.

Point Involved: Whether a marriage brokerage agreement is illegal, and whether fees paid thereunder can be recovered on any theory.

BROWN, J.: “* * * The five learned judges who have delivered opinions in the case have agreed that the contract between the parties was void, and this conclusion appears to be ably supported by authority. * * *

“* * * The defendant has, however, succeeded in the lower court on the application of the rule that a court will not lend its aid to either of the parties to an illegal or fraudulent contract, either by enforcing its execution if it be executory, or by rescinding it, if it be executed.

“Public policy has dictated the adoption of this rule, but it has its limitations, and when the parties are not equally guilty, or when the public interest is advanced by allowing the more excusable of the two to sue for relief, the courts will aid the injured party by setting aside the contract and restoring him, so far as possible to his original position. (1 Pomeroy’s Equity, sec. 403; 1 Story’s Equity, sec. 300.)

“* * * In many such cases relief from the contract will be afforded to the least guilty party when he appears to have acted under circumstances of imposition, hardship, or undue influence, and especially where there is a necessity of supporting public interests or a well settled policy of the law, whether that policy be declared in the statutes of the state or be the outgrowth of the decision of the courts.

“* * * Accordingly many cases may be cited where relief has been granted from contracts which partook of the character of marriage brokerage agreements. The cases are collected in Pomeroy’s Equity Jurisprudence, in a note to section 931; in Fonblanques Eq. (B. I., ch. 4,

Par. 10, 11), and Bacon's Abridgment, Title Marg. and Divrs. (541 *et seq.*), and need not be cited here.

"In two of the cases referred to, money paid under the contract was recovered back. (Smith v. Bruning, 2 Vern. 392; Goldsmith v. Bruning, 1 Eq. Cases Abr. 89.)

"The question in this and kindred cases, therefore, must always be whether the parties are equal in guilt.

where property
was could not
be recovered.

Obviously cases might arise where this would clearly appear and where the court would be justified in so holding as a matter of law, as where there was an agreement between two, having for its purpose the marriage of one to a third party, the parties would be so clearly in *pari delicto* that the courts would not aid the one who had paid money to the other in the promotion of the common purpose, to recover it back. Such a case would partake of the character of a conspiracy to defraud. So if two parties entered into a partnership to carry on such a business as defendant conducted, the courts would not lend their aid to either to enforce the agreement between them.

"But where a party carries on a business of promoting marriage as the defendant appears to have done, it is plain to be seen that the natural tendency of such business is immoral and it would be so clearly the policy of the law to suppress it and public interest would be so greatly promoted by its suppression, that there would be no hesitation upon the part of the courts to aid the party who had patronized such a business by relieving him or her from all contracts made, and grant restitution of any money paid or property transferred. In that way only could the policy of the law be enforced and public interests promoted.

"Contracts of this sort are considered as fraudulent in their character and parties who pay money for the purpose of procuring a husband or wife will be regarded as under a species of imposition or undue influence.

"The subject is classed by all text writers under the head of constructive or implied fraud, and it is upon the application of rules which belong to that branch of

the law that the cases have been decided to which I have referred.

“We are of the opinion, therefore, that it was error to hold as a legal conclusion that the parties to the contract in question were equal in guilt. * * *”

Question 75: State the above case, and the Court’s decision, giving the reason therefor.

(Note: The rule that if the complaining party is not in *pari delicto* [in equal guilt] he may have, where necessary, judicial rescission, does not contemplate a mere difference in degree of guilt, but rather in the nature of the guilt. There must be fraud or imposition of some sort practiced on the complaining party which notwithstanding the fact that he also is not free of guilt, will give him standing in the courts.)

Sec. 57. Exception to Rule Where Defendant’s Contract Is Executory.

Case No. 76. Mueller v. Wm. F. Stoecker Cigar Company, 131 N. W. (Nebr.) 923.

Facts: Plaintiff purchased a one-half interest in the Wm. F. Stoecker Cigar Co., paying in advance \$500.00, and agreeing to pay the residue according to an inventory to be made. The store contained about 20 slot machines, as plaintiff knew, and about which at the time he made no objection. Repenting his purchase, he now sues to recover the \$500.00 so paid on the ground that the contract was illegal.

Point Involved: Whether a party who has paid money under an illegal agreement will be allowed to withdraw from the agreement and recover such money where the other party has not performed his part of the agreement.

REESE, CH. J.: “* * * Without entering upon a description of the slot machines in use in the business, we think it must be and is conceded, that they were all gambling devices, used probably not so much as yielding a revenue to the stores in the way of winnings, but for

the purpose of stimulating trade, the purchasers preferring to take a chance of heavier winnings rather than to buy goods directly at the regular and established prices. While, in the long run, the business may not have been so much the gainer from the winnings proper, yet, by allowing others to play the hazard, the sales were very much increased. That they were gambling devices is clear enough. It is also apparent that plaintiff offered no objection to them, and was in no way conscience-smitten, either at the time of the purchase or thereafter, until he learned by consultation with others that he might avoid his contract and recover back the money paid upon the theory that the purchase of the slot machines was against good morals and public policy, and which his then enlightened conscience could not withstand. He sued defendant for the return of the money paid, instituting his suit in the county court as 'for money had and received.' * * *

“* * * At the time of the purchase, the use of slot machine was common in practically all the cigar stores in the city of Omaha, as well as elsewhere, and there seems to be no thought among proprietors of establishments owning them that their use was in violation of law, or was subject to condemnation. But these considerations cannot enter into the case as controlling the rights of the parties, however much the course pursued *See p. 24* by plaintiff may be condemned by fair-minded people as showing a want of the proper conception of business integrity. * * * The slot machines were so operated that the operator, by placing his coin within and starting the action of the machine, stood to win or lose—by a chance. This constituted gambling and the machines gambling devices. * * * It would therefore follow that defendant's business, at least, to the extent of the use of the slot machines, was an illegal one. The machines constituted a part of the stock purchased by the plaintiff. Their use constituted a part—an important part—of the carrying on of the business. It must follow that the contract of purchase was an illegal one.

The property bought included gambling devices and therefore the agreement was illegal

"It seems to be the general holding of the courts that, so long as an illegal contract remains executory, and the illegal purpose has not been put into operation, the one who has paid money thereon to the other party may repudiate the contract and recover back the money. Stover v. Flower, 120 Iowa, 514, 94 N. W. 1100, and cases there cited; McCall v. Whaley, 52 Tex. Civ. App. 646, 115 S. W. 659."

Question 76: State the facts, the question presented and the decision of the Court in the above case.

Sec. 58. Exception to Rule by Statute.

Case No. 77. Rice v. Winslow, 182 Mass. 273.

Facts: Suit brought to declare void a negotiable promissory note and a mortgage given in security thereof. There was a statute in Massachusetts giving a party a right to avoid his contracts and recover back any money paid or property parted with, in gambling transactions.

Point Involved: The right to rescind contracts of an illegal nature where the statute so provides.

MORTON, J.: "* * * The contracts (in question) were clearly wagering contracts, and, as such, illegal. * * * and prior to the passage of statute 1890, Ch. 437, the plaintiff would not have been entitled to recover any sums paid by him in the course of their performance, or to have any security that he had given declared void. * * * But the object of that statute was to discredit and discourage such transactions by giving the losing party the right to avoid his contracts and to recover back any payment made or the value of anything delivered. * * *"

Question 77: (1.) What were the facts, the question presented and the Court's decision in the above case?

(2.) Had there been no statute do you think the payee of the

note could have recovered on it, or could have foreclosed the mortgage, had the illegality been pleaded?

(3.) If the defendant could not have enforced the note or mortgage had he sued thereon, name reasons that you think of why the maker should ask affirmative relief.

(Note: Statutes of this sort are in force in a number of states with respect to money lost at gaming, money paid to lotteries, etc. Without such statute, the court could give no relief. But the statute makes exceptions of this sort on the theory that the evil can be in that way mitigated rather than by the application of the general rule, admittedly better as a general rule, than the rule of the exceptions.)

E. Contracts Whose Objects Are Partly Legal, Partly Illegal.

Sec. 59. The Rule Stated.

Case No. 78. Bixby v. Moore, 51 N. H. 402.

Facts: Moore kept a saloon in which he illegally sold liquors. He also in connection therewith operated a billiard hall legally. He employed Bixby to render services in and about the billiard hall and in selling the liquor. Bixby sued for his compensation.

Point Involved: Whether a contract the consideration for which is partly legal and partly illegal, and indivisible in its nature, can be enforced as to the legal part.

SMITH, J., delivered the opinion of the Court:
 “* * * The plaintiff would have been entitled to the reasonable worth of his entire services if no part of them had been rendered in an illegal business. It must be conceded he cannot recover for his services in the sale of liquor; but he claims a portion of his services was rendered in a legal employment and that he can recover the value of that portion. * * *

“If the consideration for the defendant’s promise to pay the plaintiff a reasonable compensation was the plaintiff’s promise to perform both classes of services, the illegal as well as the legal, it is clear the defendant’s

promise cannot be enforced. A contract is invalid if any part of the consideration on either side is unlawful. * * *

*Basis of
decision.*

“The questions arising in this case—what services did the plaintiff agree to perform? Was it an entire contract? Were there separate contracts upon separate considerations as to the legal and illegal services?—are all questions of fact. * * * In the present case, however, there is no room for but one conclusion: * * * the plaintiff made an entire promise to perform both classes of service; this entire promise * * * formed an entire consideration * * * and a part of this indivisible consideration was illegal. (Certain cases) cited by the plaintiff are not in point. In those cases the different articles sold were valued separately in the sale. * * * It is not contended that it is customary to pay saloon tenders separate prices for sweeping, for building fires, for acting as billiard markers, and for selling liquor. * * *”

Judgment for defendants.

Question 78: (1.) State the facts, the question presented and the decision of the Court in the above case.

(2.) Suppose in this case Moore had had two separate places and had employed Bixby for \$10 a week to work in the forenoons at the place legally conducted and \$10 a week to work in the afternoons in the place illegally conducted. Do you think he could have recovered for his legal employment?

CHAPTER SIX

FORM AND EVIDENCE OF CONTRACT

- | | |
|--|-------------------------------|
| A. Contracts under seal. | a written contract—the parol |
| B. Contracts required by law to be in writing. | evidence rule. |
| C. The writing as the evidence of | D. Oral and implied contract. |

A. Contracts Under Seal.

(Note: Contracts are classified as formal contracts and informal contracts. Formal contracts were contracts of record (judgments and recognizances) and contracts under seal. The latter were the only true formal contracts. All contracts not under seal were known as informal or simple contracts.)

§ 60. Definition of contract under seal.

§ 61. Legal characteristics of contract under seal.

Sec. 60. Definition of Contract Under Seal.

Case No. 79. Warren v. Lynch, 5 Johns. (N. Y.) 239.

Facts: An instrument was signed “Thomas Lynch (L. S.)” and the issue was whether under the common law then in force on that point in New York, it was under seal.

Point Involved: What under the common law was an instrument under seal.

KENT, C. J.: “A seal, according to Lord Coke (3 Inst. 169), is wax with an impression. * * * A scrawl with a pen is not a seal and deserves no notice. The law has not, indeed, declared of what precise materials the

sigili
Locus. Scelus? ~ place of the Seal

wax shall consist; and whether it is a wafer or any other paste or matter sufficiently tenacious to adhere and receive an impression is perhaps not material. But the scrawl has no one property of a seal. * * * The policy of the law consists in giving ceremony and solemnity to the execution of important instruments by means of which the intention of the parties is more certainly and effectually fixed and frauds less likely to be practiced upon the unwary. * * *

*Reason for
use of seal.*

Question 79: What was the character of the act that made an instrument under seal?

Case No. 80. Ankeny v. McMahon et al., 4 Ill. 12. The facts appear in the opinion.

Point Involved: That legislation has abolished the seal as the necessary form of the sealed instrument.

TREAT, J., delivered the opinion of the Court: “* * * The paper in question is described in the body of it, as sealed with the seals of the parties, and the letters ‘L. S.’ are in print opposite the names of Ankeny and Logan, respectively. The first section of ‘An act concerning practice’ provides ‘that any instrument of writing, to which the maker shall affix a scrawl by way of seal, shall be of the same effect, to all intents, as if the same were sealed.’ This statute gives equal solemnity to instruments to which signers affix their scrawls, as to those which they affix their seals by impression on wax or other tenacious substance. But it is urged that to give them the dignity of sealed instruments, the scrawls should be actually affixed by the signers. We do not perceive any good reason for this distinction. The printing of the scrawl, or the characters representing a seal, is as legible and durable as if made with a pen by the party, the only other usual mode of affixing a scrawl by way of seal; and it equally indicates the intention of the signer as to the character of the instrument. * * *

“If he places his signature opposite a scrawl already made, he thereby adopts it and makes it his own. These views are strengthened by reference to the decisions in 1 McLean, 462; 2 Blackf. 322; and 3 Blackf. 162. * * *”

Question 80: What was the question presented and what did the Court decide in the above case? How did this statute change the common law as laid down in the previous case?

Sec. 61. Legal Characteristics of Contracts Under Seal.

Case No. 81. Rann v. Hughes, 7 Term Reports, 350 note.

Facts: Suit against an administrator on a written promise by him to pay certain debts of deceased for which promise there was no consideration. It was contended that as the promise was in writing, although not under seal, a consideration was not necessary to support the promise.

Point Involved: Whether a contract in writing and not under seal must have consideration. Character of promise under seal.

yes.

LORD CHIEF BARON SKINNER: “All contracts are by the law of England distinguished into agreements by specialty and agreements by parol; nor is there any such third class as counsel have endeavored to maintain, as contracts in writing. If they be merely written and not specialties, they are parol and a consideration must be proved.”

Question 81: What was the point in issue? What did the Court decide? What great division of contracts did the Court make? What is the vital point of distinction?

(Note: Contracts under seal are also called contracts by “specialty,” and simple contracts are also called contracts “by parol.” The word “parol” is used in law in a number of meanings. In this connection it means any contract not under seal, whether in writing or not. It is often also used in other

connections as synonymous with "oral," and sometimes as synonymous with extrinsic, as in the law of evidence. See Secs. 75 to 79, *post*.)

Case No. 82. Walker v. Walker, 13 Ired. (N. C.) 335.

PEARSONS, J.: "We are not aware of any rule of law by which a consideration is inferred from the fact of the execution of a sealed instrument. No consideration is necessary in order to give validity to a deed (an instrument under seal). It derives its efficacy from the solemnity of its execution—the act of sealing and delivery, not upon the idea that a seal imports a consideration, but because it is his solemn act and deed and is therefore obligatory. * * * The general rule is that a deed is valid without a consideration. * * *"

ground of law

Question 82: What is the rule of law announced by the above decision?

(Note: It is often said by Courts and text writers that a contract under seal is binding because it imports a consideration, or because the party is estopped to deny a consideration. But the true rule is that by common law a contract under seal was enforceable because it *was* under seal and not because a consideration cannot be denied. This is shown by the fact that historically promises under seal were enforced before the theory of consideration was evolved. It would be just as logical to say that promises upon consideration were binding because a consideration imports a seal. The truth is that by common law, there were two sorts of contractual promises, the one under seal, enforceable because under seal, and promises upon consideration, enforceable because upon consideration. The latter contract has become the characteristic contract of modern times.)

There were certain contracts by ancient law that needed to be under seal, as deeds of conveyance, bonds and powers of attorney. But any instrument could be put under seal and such seal gave it its legal character.)

Case No. 83. William Herbert Page, Contracts, Sec. 13.

“The modern theory that contract is an agreement enforceable at law has disarranged common classifications based on the form of action. However, since the common law classification went back to the beginning of the common law itself, it survives to this day, though the original reason for its existence has long since vanished. The simple contract, though the last to be developed, is now looked upon at modern law as the contract *par excellence*. It is the representative type of contract at modern law, and possesses all the elements requisite therefor, since it is an agreement which by reason of its consideration, the law will enforce. Whether the simple contract is *expressed* or *implied* makes no difference except as to the evidence by which it is to be proved, as long as it is a genuine agreement. Contracts under seal are genuine contracts since they are agreements which, by reason of their form, are enforceable at law. They do not possess the same elements as simple contracts; for they require form which simple contracts do not; and do not require consideration which simple contracts do, but they are included under the definition of contract. By reason of the abolition of private seals in many jurisdictions, and the requirement of a consideration even in contracts under seal this class of contracts has lost its original importance.”

Question 83: (1.) What is the important type of contract of the present day?

(2.) What form of contract has lost, in many jurisdictions, its former importance? Why?

(Note: Statutes in the various states have in different degrees changed the ancient law of sealed instruments. In some the seal is abolished, in some it is still in use, but with less effect than at common law. In some it is still necessary for certain purposes.)

B. Contracts Required by Law to be in Writing. (The Statute of Frauds.)

- (a) In general of contracts that are required by law to be in writing. (b) The statute of frauds.

(a) In General of Contracts That Are Required by Law to Be in Writing.

Sec. 62. General Statement as to Contracts That Must Be in Writing.

(Editor's note: In this chapter, we consider those contracts which are required by the law to be in writing, or which are not provable in the courts unless their existence can be shown by written evidence. Contracts may be placed in writing because the law requires or because the parties desire it. Those which must be in writing because the law requires it are divisible into two classes: (1) Those contracts, in whose formation writing is essential, as deeds to real estate, negotiable instruments, acceptances of bills of exchange, etc. (2) Those which may exist as contracts though not in written form, but whose enforceability in a court depends upon their proof from some written memorandum or note, signed by the party who is sought to be charged. Such contracts are chiefly included within the provisions of "The Statutes of Frauds and Perjuries," to whose consideration we will devote the remainder of this chapter. From the subsequent sections we will understand the purview and effect of this legislation.)

Question: In what two classes may be placed contracts which are required by law to be in writing?

(b) The Statute of Frauds.*

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| (1) Generally of the purpose and history of the statute of frauds. | (2) The cases within the statute of frauds. |
| | (3) What amounts to a compliance with the statute. |

(1) Generally of the Purpose and History of the Statute of Frauds.

§ 63. Text of the statute.

§ 65. The object of the statute.

§ 64. History of the statute.

Sec. 63. Text of the Statute.

Case No. 84. Statute of Frauds and Perjuries, 29 Car.

II, Ch. 3, Sec. 4.

* The statute does not apply to -

- (a) Contracts created by law (Quasi contracts)
- (b) Instruments created under, and deriving their obligation from, special Statutes.
- (c) Executed Contracts. The purpose of the statute is

Purpose of statute of frauds; see page 141 note.

"For the prevention of many fraudulent practices which are commonly endeavored to be upheld by Perjury and Subornation of Perjury, Be it enacted * * *

"Sec. 4. That no action shall be brought (1) whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate; (2) or whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person; (3) or to charge any person upon any agreement made upon consideration of marriage; (4) or upon any contract for the sale of lands, tenements or hereditaments, or any interest in or concerning them; (5) or upon any agreement that is not to be performed in the space of one year from the making thereof; unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

"Sec. 17. That no contract for the sale of any goods, wares and merchandise, for the price of ten pounds sterling or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same or give something in earnest to bind the bargain, or in part payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized."

Question 84: State in your own language the classes of contracts covered by Sections 4 and 17 of the English statute of frauds.

(Note: The above statute is substantially in force in the American States, the verbiage itself being for the most part retained. By the Uniform Sales Act [Division III, *post*] the 17th section is virtually re-enacted, with a change of price to \$500, which is in force in some states. The commonest price substituted in the American Acts is \$50.00.)

** * Any property that may be inherited.*

and not to prohibit execution of, oral contracts

Sec. 64. History of the Statute of Frauds.

(Note: In an Article in 26 Harvard Law Review, page 329, Professor George P. Costigan disposes of a common error as to the date of the statute of frauds, caused by the adoption of the Gregorian calendar. He concludes: "Thus, with pomp and ceremony, came into legal existence that Statute of Frauds which has been both so much praised and so much deplored; and its final passage and the royal assent to it, must both be dated April 16, 1677." See also that Article for the authorship of that statute.)

Sec. 65. The Object of the Statute.

Case No. 85. Bird v. Munroe, 66 Maine, 337 (1877).

Facts: Suit on a contract of sale of ice alleged to have been made on March 2, 1874, and broken about March 10, 1874. The written evidence produced to prove the contract was made and signed by defendants March 24, 1874.

Point Involved: Whether the writing required by the statute of frauds is an essential element in the contract, or merely the evidence by which such contract may be proved.

PETERS, J.: " * * * Then the defendant next contends that, even if the writing signed by the parties was intended by them to operate retrospectively as of the first named date, as a matter of law, it cannot be permitted to have that effect and meet the requirements of the statute of frauds. * * * The point raised is, whether in view of the statute of frauds, the writing shall be considered as constituting the contract itself, or at any rate any substantial portion of it, or whether it may be regarded as merely the necessary legal evidence by means of which the prior unwritten contract may be proved. In other words, is the writing the contract, or only evidence of it? We incline to the latter view.

"Another idea gives weight to the argument for the position advocated by the plaintiffs, and that is that such

a construction of the statute upholds contracts according to the intention of the parties thereto, while it, at the same time fully subserves all the purposes for which the statute was created. It must be borne in mind that verbal bargains for the sale of personal property are good at common law. Nor are they made illegal by the statute. Parties can execute them if they mutually please to do so. The object of the statute is to prevent perjury and fraud. Of course perjury and fraud cannot be wholly prevented; but, as said by Bigelow, J. (Marsh v. Hyde, 3 Gray, 331) "a memorandum in writing will be as effectual against perjury, although subsequent to the making of a verbal contract, as if it had been executed at the moment when the parties consummated their agreement by word of mouth." We think it would be more so. A person would be likely to commit himself in writing with more care and caution after time to take a second thought. The *locus penitentiae* remains to him.

"It is clear from the foregoing cases, as well as from many more that might be cited, that the statute does not forbid parol contracts, but only precludes the bringing of actions to enforce them, as said in Thornton v. Kemper (5 Taunt. 786, 788), 'the statute of frauds throws a difficulty in the way of evidence.' In a case already cited, Jervis, C. J., said: 'the effect of the section is not to avoid the contract, but to bar the remedy upon it, unless there be writing.' See analogous case of McClellan v. McClellan, 65 Maine, 500."

Question 85: (1.) What were the facts, the question presented and the Court's decision in the above case?

(2.) Show how this case brings out that the object of the statute of frauds was not to require the formation of certain contracts to be in writing, but rather to require evidence of a certain sort. How is this fact of material importance?

(Note: It is held in many cases that the statute cannot be made a bar unless it is specially pleaded. The statute is provided for the "prevention of fraud and perjury." While it

bar = a plea defeating a plaintiff's action.

Ground upon which the decision is reached.

may be used as an unjust defense, its purpose is to prevent perjury on the part of the plaintiff by requiring him to bring in written evidence of the contract he sues upon, and on the part of the defendant by producing against him the writing which he has made and signed.)

Case No. 86. Rann v. Hughes, 7 Term Reports, 350 note.

THE LORD CHIEF BARON: “* * * But it is said that the Statute of Frauds takes away the necessity of any consideration in this case; the Statute of Frauds was made for the relief of personal representatives and others, and did not intend to charge them further than by the common law they were chargeable. His Lordship here read those sections of the statute which relate to the present subject. He observed that the words were merely negative, and that executors and administrators should not be liable out of their own estates, unless the agreement upon which the action was brought, or some memorandum thereof, was in writing and signed by the party. But this does not prove that the agreement was still not liable to be tried and judged of as all other agreements merely in writing are by the common law, and does not prove the converse of the proposition, that when in writing the party must be at all events liable. * * *

Question 86: Does the statute of frauds render enforceable a promise that was not enforceable before the statute? In other words, does it change the essential elements in contract? *no*.

(2) The Cases Within the Statute of Frauds.

§ 66. Promises of executors and administrators.

§ 67. Promises to answer for debts and defaults of others.

§ 68. Promises in consideration of marriage.

§ 69. Contracts for sale of lands or interest therein.

§ 70. Contracts not to be performed within a year.

§ 71. Sale of personal property.

The statute of frauds applies only to promises
 “(a) to answer for the debts or liabilities of the decedent
 (b) to answer for them out of the property of the promisor

Sec. 66. Promises of Executors and Administrators to Personally Answer for the Debts of the Estate of the Decedent Must Be Proved by Written Evidence Signed by the Party Sought to be Charged.

Case No. 87. Bellows v. Sowles, 57 Vermont, 164 (1884).

Facts: Bellow brought suit against Sowles, setting up that he, the plaintiff, was a relative of Hiram Sowles, deceased and being unprovided for in the will, threatened to contest the same upon the ground that it had been procured from the deceased by undue influence; that the defendant the executor under the will, being the husband of the principal beneficiary, had promised plaintiff \$5,000 to forbear the contest, and the plaintiff had assented thereto and had accordingly forborne; yet the defendant disregarding the promise, had failed and refused to pay plaintiff the said amount. The defendant claims that this promise if made, is unenforceable because not in writing as required by the statute of frauds.

Point Involved: Whether the promise by the executor to pay an heir for refraining from contesting a will, is a promise to pay for a debt of the estate of the testator, and therefore by the provisions of the statute of frauds not enforceable unless evidenced by writing signed by such executor, or whether it was a direct primary undertaking by the executor, not included within the statute of frauds, and therefore binding though oral.

POWERS, J.: "Counsel for the defendant have demurred to the declaration in this case upon two grounds: first, that the consideration alleged is insufficient; secondly, that the promise not being in writing comes within, and is therefore not enforceable under, the statute of frauds.

"It has been so often held that forbearance of a legal right affords a sufficient consideration upon which to found a valid contract, and that the consideration re-

Demurring: stopping of a legal action by a point for the court to determine.

quired by the statute of frauds does not differ from that required by the common law, it does not appear to us to be necessary to review the authorities or discuss the principle. As to the second point urged in behalf of the defendant, the case presents greater difficulties. * * *

“The best understanding of the statute is derived from the language itself, viewed in the light of the authorities which seem to us to interpret its meaning as best to attain its object. That clause of the statute under which this case falls, reads: ‘No action at law or in equity shall be brought * * * upon a special promise of an executor or administrator to answer damages out of his own estate.’

“* * *

“The promise must be to ‘answer damages out of his own estate.’ This phraseology clearly implies an obligation, duty or liability on the part of the testator’s estate for which the executor promises to pay damages out of his own estate.

“* * *

“Apply this rule to this case. Here, the main purpose of the promisor was not to answer damages (for the testator) out of his own estate, but was entirely to subserve some purpose of the defendant. The matter did not affect the estate. * * * There exists, therefore, in this case no sufficient, actual, primary liability to which this promise could be collateral. * * * The plaintiff would be deprived of his legal right to contest the will, by a party who has reaped all the benefit of the transaction, and is shielded from responsibility by a technicality. We do not believe that this was the result contemplated by the statute. * * *

Question 87: (1.) What promise did the executor make in the above case?

(2.) What two defenses were made to the plaintiff’s claim? What is the answer to each of those defenses?

(3.) State a case that would have come within the statute of frauds.

1 Case does not come under statute of frauds

Sec. 67. Promises to Answer for the Debts, Defaults or Miscarriages of Another Must Be Proved by Written Evidence Signed by the Party Sought to Be Charged.

Case No. 88. Jones v. Cooper, 1 Cowper's Reports, 227.

Facts: An oral promise by defendant upon goods being delivered by plaintiff to Smith, in these words "I will pay you if Smith will not." Defense, the statute of frauds.

Point Involved: Whether the promise by a third person to a creditor to pay if the debtor does not must be in writing under the statute of frauds.

LORD MANSFIELD: "We are all of opinion upon the authority of the cases in the books, that the promise by the defendant in this case, to pay if Smith did not, is a collateral undertaking within the statute of frauds; and it is so clear it would be misspending time to go through the cases, or to say much about it."

Question 88: State the above case.

Comes under the statute of frauds.

Case No. 89. Marr v. B. C. R. & N. Rwy. Co., 121 Iowa 117.

Facts: Plaintiff, Marr, kept a boarding house in Cedar Rapids, and claims that in April, 1901, the Rwy. Co. made an oral contract with her that she should board at least 60 of the Company's employees for a period of six months, and they agreed to furnish her at least that number. That she agreed to take such boarders at the price named, but that the Company sent her only about 20 boarders, and that in June, they refused to send her any more boarders. The statute of frauds was pleaded.

Point Involved: Whether the agreement by the Company with the plaintiff that the Company would pay her if she should board a number of employees to be furnished by the Company, was a promise to answer for the

debt of another and therefore not enforceable unless in writing.

“* * * It is said in the first place that the oral contract sued upon was within the statute of frauds, there being no written or competent evidence to establish the same. * * *

“But, * * * the objection is not well taken. The agreement was with the company to board its employees, and plaintiff was to be paid by the company. There was no promise to answer for the debt, default or miscarriage of another. * * *

Question 89: (1.) State the facts, the question presented and the Court's decision in the above case.

(2.) A, being a stranger in the City of Chicago and desiring to obtain board at a certain hotel, has his friend B come to the hotel and promise the manager that if A does not pay his hotel bill, he, B, will pay it. A leaves without paying his bill and the hotel sues B. B pleads that he is not bound on his promise because it was not in writing as required by the statute of frauds. Would you distinguish this case from the case above? Why?

(3.) A desires to open up a retail store and for that purpose to procure goods from the M. Wholesale House. He goes to the M. House in company with his friend B, a merchant who already has a line of credit with the M. Wholesale House. B makes an oral statement which, in a suit afterwards brought by the Wholesale House against B (A becoming insolvent) is alleged by the House, to have been in these words: “Let A have goods up to \$500 and charge it to my account,” but which is alleged by A to have been: “Let A have goods up to \$500 and if he doesn't pay, you may look to me.” What substantial difference would the different statements make?

(Note: If one promises to pay for goods procured by another, it is evident he may thereby either incur a primary debt of his own, or a debt that is merely collateral to the debt of another. As an extreme illustration, A finds a tramp on the street and asks M to let him have a new suit of clothes and charge it to A. Clearly this is not a promise to answer for the debt of another, as M looked solely to A, as his debtor, no mat-

ter who else might have been benefited. So the party to whom the goods were delivered might be a responsible merchant, and yet M might look entirely to the sponsor. In such a case the statute of frauds is no defense. But if *any credit* is extended to the other, then the promise is to answer for the debt of another and is not enforceable unless in writing and signed.)

Case No. 90. Lusk v. Throop, 189 Illinois Reports, 127.

MR. JUSTICE MAGRUDER delivered the opinion of the court: “* * * If the plaintiff’s books show that the defendant was not originally indebted there, but that the goods were charged against the person receiving them, this fact if unexplained by other circumstances, would be strong evidence going to show that credit was given the person receiving the goods: * * * but it is not conclusive evidence of such fact. * * * It might be rebutted by other evidence of a more convincing character and this is a question for the consideration of the jury to be determined from all the circumstances of the case. * * *”

Question 90: To what extent does the Court decide that the merchant’s book entries may show to whom credit was given?

Case No. 91. Warren v. Smith, 24 Texas Reports, 484.

Facts: The evidence of Smith, the plaintiff, tended to prove that Royalls & Jackson owed Smith, the plaintiff, a sum of money and that these parties being present and also Warren, Warren orally agreed to pay Smith the amount owed him by Royalls and Jackson, and Smith, the plaintiff, agreed to this and thereupon released Royalls and Jackson of their debt. Defendant, Warren, claims the statute of frauds as a bar.

Point Involved: Whether a promise to assume another’s debt under an arrangement with the creditor and the debtor by which the original debtor is released upon such assumption is within the statute of frauds.

BELL, J.: “* * * It is well settled that the clause of the statute of frauds which relates to promises to answer for the debt, default or miscarriage of another person, has reference to promises which are distinctively collateral to the undertaking of the party originally liable. If the promise to answer for the debt of another is collateral only, and if the original liability continues to subsist, the collateral promise is within the statute; but if, by the new promise, the original liability is extinguished, then the new promise is not within the statute, which need not be in writing. * * *”

Question 91: What were the facts, the question presented and the Court's decision in the above case?

Case No. 92. Spadone v. Reed and Thompson, 7 Bush's Reports (Ky.) 455.

Facts: Spadone sued Reed as his original debtor and Thompson as beneficiary of an alleged agreement whereby Thompson agreed *with Reed* to pay Reed's debt to Spadone.

Point Involved: Whether a promise to a *debtor* to pay his debt to the creditor, is a promise within the statute of frauds.

JUDGE LINDSAY: “* * * The statute of frauds cannot be made available as a defense to this action. The promise of Thompson to pay the debt of Reed was not made to Reed's creditor, but directly to Reed himself and therefore can be enforced though not in writing.”

Question 92: What were the facts, the question presented and the Court's decision in the above case?

Sec. 68. Promises in Consideration of Marriage Must Be Proved by Written Evidence Signed by the Party Sought to Be Charged.

Case No. 93. Austin v. Kuehn, 211 Illinois, 113.

Statement of Facts: C. M. A. files her claim against the

estate of J. E. Baker, alleging a promise by Baker to pay her \$7,500 when she should marry a certain person whom she afterwards in consideration thereof did marry.

Point Involved: That a promise made in consideration of marriage is not enforceable unless in writing.

MR. JUSTICE WILKINS delivered the opinion of the Court: “* * * The Statute of Frauds provides: ‘No action shall be brought whereby to charge * * * any person upon any agreement made upon consideration of marriage * * * unless the promise or agreement upon which said action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some person thereunto by him lawfully authorized. Saylor (a witness) testified that deceased, * * * gave witness a card with the name ‘James E. Baker’ printed on one side of it and on the other ‘\$7,500.’ This card was not produced in evidence, and even if it had been, it was not such an agreement, note or memorandum, in writing, as is required by the foregoing statute. The alleged promise being oral and given originally in consideration of marriage, was within the statute of frauds and no action could be maintained upon it. * * *”

Question 93: State the facts, the question presented and the Court’s decision in the above case.

Case No. 94. Withers v. Richardson, 5 T. B. Monroe, 94.

JUDGE MILLS: “This is an action of assumpsit on a promise to marry, and a verdict and judgment for the plaintiff below; to reverse which, this writ of error is prosecuted.

“* * * The defendant pleaded that the contract was in parol only, and relied on the statute * * * (of frauds). * * * It has never been held that the words of the statute ‘any agreement made upon consideration

of marriage' meant or included promises to marry. It would be imputing to the legislature too great an absurdity, to suppose that they had enacted that all our courtships, to be valid, must be in writing. * * *

Question 94: Does the statute of frauds cover mutual promises to marry?

Sec. 69. Contracts for the Sale of Lands or any Interest in or Concerning Them Must Be Proved by Written Evidence Signed by the Party Sought to Be Charged.

Case No. 95. Kirkeby v. Erickson, 90 Minnesota Reports, 299.

Facts: Suit for damages for breach of an oral contract whereby plaintiff sold defendant growing wild grass to be cut by the defendant. Defense, the statute of frauds.

Point Involved: Whether a sale of growing wild grass to be cut by the vendee, is a contract creating an interest in real estate and therefore not enforceable unless in writing.

COLLINS, J.: “* * * The grass which was the subject of the oral contract was a part of the plaintiff's real estate, and the agreement was void, because it attempted to create an estate in land, and was not in writing. * * * At common law, grasses growing from perennial roots are regarded as *fructus naturales*, and while unsevered from the soil, are considered as pertaining to the realty. * * * In this particular case, the right of the defendant to enter upon plaintiff's premises for the purpose of cutting and removing the grass was implied from the fact of the sale. * * * Such a case must be distinguished from one where the vendor of the property sold is to sever it from the soil himself. Verbal sales of that character have frequently upheld as not within the statute. * * *

Question 95: (1.) What were the facts, the question presented and the Court's decision in the above case?

(2.) What are *fructus naturales*? *Fructus industriales*?

(3.) What did the court say with reference to distinguishing this case from one in which the vendor is to cut the grass?

(Note: See also next case.)

Case No. 96. *Dorris v. Kings*, 54 S. W. Rep. (Tenn.) 683.

Statement of Facts: Suit upon an alleged contract whereby defendants agreed to furnish plaintiffs all the merchantable timber on defendants' lands, cut into saw-logs of the proper length for manufacture into lumber. Defense, the statute of frauds.

Point Involved: Whether a contract to sell logs to be furnished and delivered by the seller from timber now growing, is a contract creating an interest in real estate, or a contract to sell personal property.

BARTON, J.: “* * * This, as we understand the law, is simply an executory contract to sell and deliver certain personal property. It does not purport to be a contract selling them (*Dorris & Sons*) certain trees standing on the land, nor giving them a license to go upon the land to get certain trees, but is a contract on the part of the defendants to sever or cut and deliver all the merchantable timber. In the case of *New York & E. T. Iron Co. v. Green County Iron Co.*, 11 Heisk. 434, * * * Judge Freeman, * * * said: ‘This was a contract for the sale of personality; that is, an agreement to sell the timber designated. But the property did not pass with the timber until it could be used or received by the purchaser,—at any rate, not until cut and corded, as it was to be paid for by the cord as used.’ * * * This case is much stronger. * * * we think that the portion of the contract for the breach of which this suit was brought, was clearly only an executory contract for the sale and delivery of severed timber, personal property, and therefore not within the statute of frauds.

* * *

Question 96: (1.) State the facts, the question presented and the Court's decision in the above case.

(2.) Why is there a difference between this case and Case No. 95?

(3.) A has a coal mine. He makes a contract with B whereby B is to be allowed to come into the mine and dig a certain quantity of coal. He makes another contract with C, whereby he is to sell and deliver at C's factory 100 tons of coal, from the coal, which is not yet severed. Both contracts are oral. So far as the section of the statute of frauds relating to real estate is concerned, can either party enforce his contract? Why?

(Note: The student is sometimes confused on cases of this sort because the statute of frauds also relates to sales of personal property. But it must be remembered that the section in reference to personal property is not in force in all jurisdictions (though in most), and that under that section sales of personal property are enforceable though *not* in writing if there is a part delivery and acceptance, or a part payment.)

Case No. 97. Bull v. Griswold, 19 Ill. 631.

Point Involved: Whether a sale of growing crops is a sale of real estate.

CATON, C. J.: “* * * Growing crops are so far personalty that they may be sold and transferred by parol. * * * They partake of realty, no doubt, so far as to pass by a deed of the land as incident to it, and so it is with many other articles which are well settled to be personal property, as fixtures of trade or machinery erected for mechanical purposes. If the wheat was sold by parol by the defendant to the plaintiff, that vested in him a good title.

Question 97: (1.) Are growing crops considered as real property or personal property so far as a sale of the crop is concerned?

(2.) What is the rule where the land is sold upon which the crops are growing, if there is no reservation of such crops?

(3.) To what other property did the court liken growing crops?

(4.) Distinguish this case from case 95.

(Note as to short term leases: Short term leases, generally in the American statutes, for the term of one year, or in some states for three years, are excepted from the operation of the statute. The question arises whether this provision is to be construed in connection with the provision of the statute in reference to contracts that are not to be performed within a year from the making thereof. That is, if an oral lease for one year is valid by the statute, is such lease enforceable if it is to commence *in futuro*, so that it cannot be completed for *more* than a year. Some of the statutes provide that a lease for one year *from the making thereof*, need not be in writing, but most of the statutes omit that phrase. It is held in some jurisdictions that a lease to commence *in futuro* must end within a year from the time it is made, otherwise it is unenforceable for any period. See *Wheeler v. Frankenthal*, 78 Ill. 124. But other cases hold that a lease for the full year, though to begin in the future, is valid. See *Young v. Dake*, 5 N. Y. 463.)

Sec. 70. Contracts That Cannot Be Performed Within a Year from the Making Thereof Must Be Proved by Written Evidence Signed by the Party Sought to Be Charged.

Case No. 98. *Chase v. Hinkley*, 126 Wis. 75.

Facts: A sued B for \$39.00 for services rendered to B. B's defense was that A contracted to work for him for one year, but worked only a short time and broke his contract by quitting without cause. The evidence showed that in October, 1904, A orally agreed to work for B for one year beginning the following Monday; that A began work and performed services of the reasonable value (as on an implied contract) of \$39.00 and then quit. A maintains that B cannot prove the alleged contract by way of defense, the same being oral and therefore within the statute of frauds.

Point Involved: Whether a contract for service which cannot be performed within a year from the making thereof, must be in writing in order to be proved in a judicial proceeding.

MARSHALL, J.: “* * * The excess of two days was

just as efficient as a longer period to render the agreement void under * * * (the statute of frauds).
 * * * The fact that the period of service agreed upon was to extend for one year from the time the performance commenced does not take the case out of the statute, for, where performance is to commence in the future, for the purposes of the statute the period to be considered is that beginning with the date of the agreement
 * * * ”

Question 98: What were the facts, the question presented and the Court's decision in the above case?

Case No. 99. Warner v. Texas & Pacific R. Co., 164 U. S. 418.

Facts: “This was an action brought May 9, 1892, by Warner against the T. & P. R. Co., upon a contract made in 1874, by which it was agreed between the parties that, if the plaintiff would grade the ground for a switch, and put on the ties, at a certain point on the defendant's railroad, the defendant would put down the rails, and maintain the switch for the plaintiff's benefit for shipping purposes, as long as he needed it. The defendant pleaded that the contract was oral and within the statute of frauds, because it was ‘not to be performed within one year from the making thereof, * * *.’ ”

Point Involved: Whether a contract that *may* be performed within a year (though the possibility be remote), is a contract covered by the language of the statute of frauds “not to be performed within a year,” in other words whether the statute requires contracts that may be performed within a year but may take longer than that time, or simply contracts that *cannot* be performed within a year to be in writing.

MR. JUSTICE GRAY: “In the earliest reported case in England upon this clause of the statute regard seems to have been had to the time of actual performance in deciding that an oral agreement that, if the plaintiff

would procure a marriage between the defendant and a certain lady, the defendant would pay him fifty guineas, was not within the statute; Lord Holt saying: 'Though the promise depends upon a contingent, the which may not happen in a long time, yet, if the contingent happen within a year, the action shall be maintainable, and is not within the statute.' *Francam v. Foster*, (1692) *Skin.* 326; *S. C.*, Holt, 25.

"A year later, another case before Lord Holt presented the question whether the words, 'agreement not to be performed within one year,' should be construed as meaning every agreement which *need* not be performed within the year, or as meaning only an agreement which *could* not be performed within the year, and thus, according as the one or the other constructions should be adopted, including or excluding an agreement which might or might not be performed within the year, without regard to the time of actual performance. The latter was decided to be the true construction.

(Here the Court discusses numerous authorities.)

"In the case at bar, the contract between the railroad company and the plaintiff, as testified to by the plaintiff himself, who was the only witness upon the point, was that, if he would furnish the ties and grade the ground for the switch at the place where he proposed to erect a sawmill, the railroad company would "put down the iron rails and maintain the switch for the plaintiff's benefit for shipping purposes as long as he needed it."

"The parties may well have expected that the contract would continue in force for more than one year. It may have been very improbable that it would not do so; and it did, in fact, continue in force for a much longer time. But they made no stipulation which, in terms, or by reasonable inference, required that result. The question is not what the probable, or expected, or actual performance of the contract was, but whether the contract, according to the reasonable interpretation of its terms, required that it should not be performed within the year. No definite term of time for the performance of the

contract appears to have been mentioned or contemplated by the parties, nor was there any agreement as to the amount of lumber to be sawed or shipped by the plaintiff, or as to the time during which he should keep up his mill.

“The contract of the railroad company was with, and for the benefit of, the plaintiff personally. The plaintiff’s own testimony shows (although that is not essential) that he understood that the performance of the contract would end with his own life. The obligation of the railroad company to maintain the switch was in terms limited and restricted by the qualification ‘for the plaintiff’s benefit for shipping purposes as long as he needed it,’ and no contingency which should put an end to the performance of the contract, other than his not needing the switch for the purpose of his business, appears to have been in the mouth or in the mind of either party. If, within a year after the making of the contract, the plaintiff had died, or had abandoned his whole business at this place, or for any other reason had ceased to need the switch for the shipping of lumber, the railroad company would have been no longer under any obligation to maintain the switch, and the contract would have been brought to an end by having been fully performed.

“The complete performance of the contract depending upon a contingency which might happen within the year, the contract is not within the statute of frauds as an ‘agreement which is not to be performed within the space of one year from the making thereof.’ ”

Question 99: (1.) State the facts in the above case, the question presented and the Court’s decision.

(2.) A orally agrees to support B for life. B is fifty years of age and in fair health. Is the contract enforceable? (Heath v. Heath, 31 Wis. 223.)

Sec. 71. Contracts of Sale of Goods, Wares and Merchandise, of a Certain Price or Upwards Are Not En-

forceable Unless (1) in Writing and Signed, or (2) There Is Part Delivery and Acceptance, or, (3) There Is Part Payment.

(Note: This provision not in force in all states.)

Case No. 100. Baldy v. Parker, 2 B. & C. 37.

Facts: A went to the shop of B and Company, linen drapers, and contracted for the purchase of various articles, each of which was priced below the amount named in the statute of frauds, but the whole aggregated more than that amount. He afterwards refused to take the goods and when sued for the breach of the contract, plead the statute of frauds. But it was contended that the statute did not apply because each article was separately priced at a sum below the statutory amount.

Point Involved: Whether a sale of various articles separately priced is one entire sale or several sales within the statute of frauds.

BAYLEY, JUSTICE: “* * * The question is, whether there was a separate contract for each article. The statute (of frauds) was passed to guard against frauds and perjuries; * * * the legislature thought that a contract to the extent of 10 l. might be sufficient to induce the parties to it to bring tainted evidence into Court. Now it is conceded here that on the same day, and indeed at the same meeting, the defendant contracted with the plaintiffs for the purchase of goods to a much greater amount than 10 l. Had the entire value been set upon the whole goods together there cannot be a doubt of its being a contract for a greater amount than 10 l., within the seventeenth section of the statute; and I think that the circumstance of a separate price being fixed upon each article makes no such difference as will take the case out of the operation of that law. It has been asked, what interval of time must elapse between the purchase of different articles in order to make the contract separate, and the case has been put of a purchaser leaving a shop after making one purchase and returning after

an interval of five or ten minutes and making another. If the return to the shop were soon enough to warrant a supposition that the whole was intended to be one transaction, I should hold it one entire contract within the meaning of the statute.

Question 100: What are the facts in the above case, and the rule thereupon?

Case No. 101. Goddard v. Binney, 115 Mass. 450.

Facts: A ordered of B, a carriage manufacturer, a buggy, to be built specially for A, according to oral specifications given, to include A's monogram and initials. B built the buggy. And on an attempt to charge A on the contract, A plead the statute of frauds. The question was whether this was a contract "for the sale" of goods, and therefore within the statute, or a contract for the *manufacture* of goods, and not within the meaning of the statute.

Point Involved: What is a contract of sale within the meaning of the statute of frauds.

AMES, J., delivered the opinion of the Court: "* * * According to a long course of decisions in New York, and in some other states of the Union, an agreement for the sale of any commodity not in existence at the time, but which the vendor is to manufacture or to put into condition to be delivered (such as flour from wheat not yet ground, or nails to be made from iron in the vendor's hands), is not a contract of sale within the meaning of the statute. * * * In England, on the other hand, the tendency of the recent decisions is to treat all contracts of such a kind intended to result in a sale as substantially contracts for the sale of chattels; and the decision in *Lee v. Griffin*, 1 B. and S., 272, goes so far as to hold that a contract to make and fit a set of artificial teeth for a patient is essentially a contract for the sale of goods and, therefore, is subject to the provisions of the statute. * * *

"In this commonwealth a rule avoiding both these extremes was established * * *. The effect of these decisions we understand to be this, namely, that a contract for the sale of articles then existing, or such as the vendor in the ordinary course of his business manufactures or procures for the general market, whether on hand at the time or not, is a contract for the sale of goods to which the statute applies. But * * * if the goods are to be manufactured especially for the purchaser, and upon his special order, and not for the general market, the case is not within the statute * * *."

(The Uniform Sales Act adopts this last named view, called the Massachusetts rule.)

Question 101: What is the English rule, the New York rule and the Massachusetts rule, as to whether a contract is one of "sale" or of "manufacture" within the statute of frauds? What is the rule adopted by the Uniform Sales Act?

(Note: The Uniform Sales Act being now in force in New York, the rule has been changed in that state to the Massachusetts rule.)

(3) What Amounts to a Compliance with the Statute.

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| § 72. The memorandum and signature. | § 74. Compliance by payment in whole or part in sales of personal property. |
| § 73. Compliance by delivery and acceptance in sales of personal property. | |

Sec. 72. The Memorandum and the Signature.

Case No. 102. Gault v. Stormont, 51 Mich. 636.

Facts: Plaintiff Gault owned a house and two lots in Wyandotte, Michigan, and on April 26, 1881, contracted to sell them to the defendant, Stormont. Defendant paid \$75.00 down, and plaintiff gave him the following receipt:

"Wyandotte, April 26, 1881.

"Received from George Stormont the sum of
Seventy-five dollars as part of the principal of ten

hundred and fifty dollars on sale of my house and two lots on corner of Superior and Second streets in this city.

DAVID GAULT."

Gault being afterwards unable to give a deed because his wife would not join therein, brings suit against Stormont for the possession of the land which he had allowed Stormont to enter.

Point Involved: Whether under the statute of frauds a memorandum which does not state the terms of sale is a sufficient memorandum to bind the party signing the same.

COOLEY, J.: "* * * There was no written evidence of the sale of the lots except the receipt which was given for the seventy-five dollars, and that was insufficient to answer the requirements of the statute of frauds, for though it specified the purchase price, it failed to express the time or times of payment, and there is no known and recognized custom to fix what is thus left undetermined. A memorandum to be sufficient under the statute must be complete in itself and leave nothing to rest in parol. * * *" (Held memorandum insufficient.)

Question 102: State the facts in the above case and show why the memorandum set out was not a sufficient compliance with the statute of frauds.

(Note: By statute in some states the memorandum need not state the *consideration*, which may be proved by parol. But the memorandum must otherwise be complete to show the description of the parties, the terms, and the subject matter. If the consideration was not mentioned, but was left to be *implied*, as in cases of sales of personal property or for services, the memorandum may be sufficient to bind without a statement as to the price.)

Case No. 103. Louisville, etc., Co. v. Lorick, 29 S. C. 533.

Facts: Plaintiff's salesman, under verbal instructions from defendant, sent a written order to plaintiff

to ship to defendant a certain amount of paint, at a stated price, payable in 60 days. After the goods were in transit, defendant wrote: "Don't ship paint ordered through your salesman; we have concluded not to handle it." Plaintiff refused to accept this revocation and sued for breach. Defendant plead the statute of frauds, namely, that there was no delivery and acceptance, no payment and no memorandum signed by defendant.

Point Involved: Whether and under what circumstances the "memorandum" required by the statute of frauds may consist in a number of writings.

MR. JUSTICE McIVER delivered the opinion of the Court: "* * * It is quite certain that there was no formal agreement in writing, signed by the party to be charged * * * and we think it equally certain that there was no *single* instrument or memorandum in writing sufficient to satisfy the requirements of the statute; for the letter of the defendants * * * did not specify the necessary particulars, as to quantity, nature and price of the goods * * * and the copy of the order sent by the salesman to the plaintiff, which did contain all the necessary particulars, was not signed by the defendant. It is plain, therefore, that neither one of these papers standing alone, would be sufficient. But it is well settled that the whole agreement need not appear in a single writing, but may be made out from several instruments or written memoranda, referring one to the other, and which, when connected together, are found to contain all the necessary elements, and the precise, practical question in this case is, whether the letter of defendants can be connected with the written order sent by the salesman, so that the two together may constitute a sufficient note or memorandum in writing to satisfy the requirements of the statute. * * *

"It seems to us that the letter of defendants, taken, as it must be, in connection with the order sent to plaintiff by the salesman (of plaintiff) to which it expressly referred, and which was in writing, and specified all the

necessary particulars as to price, quantity, quality and time of payment, constituted a sufficient note or memorandum in writing of the bargain to take the case out of the statute of frauds * * *."

(In this case, which held there was a sufficient memorandum, signed by the party to be charged, there was a dissenting opinion by one of the judges that the letter which defendant signed, and which contained no particulars, did not sufficiently refer to the order, not signed by defendant, to identify or incorporate it. The rule, however, is that the writing required by the statute may be one or a series of writings constituting one transaction, which are all signed, or which are sufficiently referred to by the one that is signed.)

Question 103: What were the facts, the question presented and the Court's decision in the above case?

(Notice how this case illustrates the point that the statute of frauds has nothing to do with the essential validity of the contract, but only with the evidence to prove it. Here, a party, in his very attempt to break a contract, furnished the proof to the other party that there was such a contract.)

Case No. 104. Clason v. Bailey, 14 Johns. Rep. (N. Y.) 484.

Facts: The facts are stated in the opinion.

Points Involved: Whether both parties, or which party, must sign the agreement or memorandum; whether the signature may be by agent; whether it must be at the bottom of the memorandum, and whether it may be by lead pencil.

THE CHANCELLOR: "Isaac Clason employed John Townsend to purchase a quantity of rye for him. He, in pursuance of this authority, purchased of Bailey & Voorhees 3,000 bushels at \$1.00 per bushel, and at the time of closing the bargain he wrote a memorandum in his memorandum book in the presence of Bailey & Voorhees in these words:

" 'February 29, bought for Isaac Clason of Bailey &

Voorhees 3,000 bushels of good merchantable rye, deliverable from the 5th to the 15th of April next, at \$1.00 per bushel, and payable on delivery. * * *

"It is admitted Clason signed this contract by the insertion of his name by his authorized agent in the body of the memorandum. * * * It is a point settled that if the name of a party appears in the memorandum and is applicable to the whole substance of the writing and is put there by him or his authority, it is immaterial in what part of the instrument the name appears, whether at the top, in the middle or at the bottom. * * * Clason's name was inserted in the contract by his authorized agent, and if it were admitted that the name of the other party was not there by their direction, yet the better opinion is * * * *that it is sufficient if the agreement be signed by the party to be charged.*

"* * * Clason, who signed the agreement, and is the party sought to be charged, is, then, according to the authorities, bound by the agreement and he cannot set up the statute in bar. * * *

"The remaining objection is that the memorandum was made with a lead pencil. The statute requires a writing. It does not undertake to define with what instrument or with what material the contract shall be written. * * * It has been admitted * * * that printing was writing within the statute, and * * * that stamping was equivalent to signing and * * * that making a mark was subscribing within the act.

"The statute of frauds * * * did not require any solemn and formal instrument. It only required a note or memorandum, which imports a writing done on the spot in the moment and hurry and tumult of commercial business. A lead pencil is generally the most accessible and convenient instrument of writing on such occasions and I see no reason why we should wish to put an interdict on all memoranda written with a pencil. * * *

Question 104: Answer the questions above suggested in the "Points involved" in this case.

Sec. 73. Compliance by Delivery and Acceptance in Sales of Personal Property.

Case No. 105. Shindler v. Houston, 1 New York, 261.

Facts: Suit for the price of a quantity of lumber. Plaintiff was owner of about 2,070 feet of curled maple plank scantling, which he had brought to Troy in a boat, and which, after being inspected and measured, was piled on the dock apart from any other lumber. Soon after this the plaintiff and defendant met at the place where the lumber lay. The plaintiff said to the defendant, "What will you give me for the plank?" The defendant said he would give three cents a foot. The plaintiff then asked, "What will you give for the scantling?" The defendant replied, "One and a half cents a foot." The defendant then said, "The lumber is yours." The defendant thereupon told the plaintiff to get the inspector's bill of it and carry it to Mr. House, who would pay it. The next day the plaintiff having procured the inspector's bill presented it to House, who refused to pay for it. There was no note or memorandum in writing, nor was there any evidence of a delivery or acceptance of the lumber, except as above stated. At the prices agreed on, the lumber came to \$52.51, no part of which was ever paid.

Point Involved: What constitutes a "delivery and acceptance" within the meaning of the 17th section of the statute of frauds?

GARDINER, J.: "As no part of the purchase money was paid by the vendee, the contract above stated was void (voidable) by the statute of frauds * * * unless the buyer 'accepted and received' the whole or part of the property sold.

"The object of the statute was not only to guard against the dishonesty of parties and the perjury of witnesses, but against the misunderstanding and mistakes of honest men. If the contract is reduced to writing, and 'subscribed by the parties to be charged thereby,' this object

is effectually attained. The writing becomes its own interpreter. Where this is omitted but the vendee has paid part of the price, or the vendor had delivered and the buyer has accepted a portion or all of the property, upon the strength of the agreement, these acts not only indicate deliberation and confidence upon the part of the contractors, but they furnish unequivocal evidence of the existence of a contract of some sort between them, although its terms and provisions must after all depend upon the recollection of witnesses.

“The case before us is destitute of all such collateral evidence. No acts of the party sought to be charged are proved. We are presented with a naked verbal agreement. The declarations relied upon as evidence, of a delivery and acceptance constitute a part of the contract, and of course are obnoxious to all the evils and every objection against which it was the policy of the law to provide.

“The acts of part payment, of delivery and acceptance mentioned in the statute are something over and beyond the agreement of which they are a part performance, and which they assume as already existing. The entire absence of such evidence distinguishes the present case from all those that have been cited by the counsel for the plaintiff in support of this action.

* * *

“I am aware that there are cases in which it has been adjudged, that where the articles sold are ponderous, a symbolical or constructive delivery will be equivalent in its legal effect to an actual delivery. The delivery of a key of a warehouse in which goods sold are deposited, furnishes an example of this kind. But to aid the plaintiff, an authority must be shown that a stipulation in the contract of the sale, for the delivery of the key or other indicia of possession will constitute a delivery and acceptance within the statute. No such case can be found. The entire contract being void by the statute, the stipulation in reference to a constructive delivery would fall with the other provisions. * * *

“This, I apprehend, is the correct rule and it is obvious that it can only be satisfied by something done subsequent to the sale unequivocally indicating the mutual intentions of the parties. Mere words are not sufficient (3 Johns. 421). Declarations accompanying an act and explanatory of it are undoubtedly admissible evidence, as a part of the *res gestæ*. * * *

“The language is unequivocal and demands the action of both parties, for acceptance implies delivery, and there can be no complete delivery without acceptance. The defendant, however, said nothing and did nothing subsequent to the agreement, except through his agent, to repudiate the contract. There was consequently no evidence of a delivery. * * *”

Question 105: State the facts, the question presented and the Court’s decision in the above case.

Case No. 106. United Hardware Co. v. Blue, 59 Florida 419 (1910).

Facts: Plaintiff sued defendant, K. A. Blue, basing his action on a bill of hardware sold to Blue, but which Blue refuses to receive and pay for as goods purchased of the plaintiff. Omitting statements of facts not necessary to recite here, the order was not in writing, but consisted in a mere verbal arrangement. The goods were afterwards delivered to an express company, properly addressed to defendant. Defendant pleads the statute of frauds.

Point Involved: Delivery to a carrier by the vendor of goods sold, constituting for some purposes, delivery to the vendee; does such delivery to and the receipt by the carrier constitute a delivery and acceptance within the statute of frauds?

PARKHILL, J.: “* * * No note or memorandum in writing of the bargain or contract for the sale of the goods in question was ever made or signed by or for the defendant, neither did he give anything in earnest to bind the bargain or in part payment. But it is contended

that the defendant buyer accepted the goods so sold and actually received the same, making the contract good under the statute. Our statute is like the Seventeenth Section of 29 Charles 11, and in order to bring a contract for the sale of goods within this exception it is necessary that the goods should have been received and also accepted by the buyer. Even the delivery of the goods to the buyer or the receipt of them by him, without an acceptance, is not sufficient. *Hinchman v. Lincoln*, 124 U. S. 38, 31 L. 3d 337, 8 Supt. Ct. Rep. 369. Some act or conduct on the part of the buyer or his authorized agent, maintaining an intention to accept the goods as a performance of the contract, and to appropriate them, is required to supply the place of a written contract, or payment or part payment. * * *

“The plaintiff in error contends that ‘delivery to the common carrier was a delivery to the consignee.’ But our statute requires not only that the buyer should actually receive the goods, but that he shall accept the same also. True, the acceptance and receipt of the goods may be through an authorized agent, but a common carrier (whether selected by the seller or buyer) to whom the goods are intrusted without instructions to do anything but to carry and deliver them to the buyer, as was the case here, is no more than an agent to carry and deliver the goods, and has no implied authority to do the act required to constitute an acceptance and receipt on the part of the buyer and to take the case out of the statute. * * *

Question 106: What were the facts, the question presented and the Court’s decision in the above case?

Case No. 107. *Moore v. Love*, 57 Mississippi 765.

Statement of Facts: An oral sale of cotton was alleged. The statute of frauds being pleaded, the question was whether there had been a sufficient delivery and acceptance of part of the goods to satisfy the statute and prevent the defense. The only evidence of a part de-

livery was that certain samples of the cotton were exhibited and delivered at the time of the sale.

Point Involved: Whether the delivery and acceptance of samples of the goods sold is a delivery and acceptance of part of the goods within the statute of frauds.

CHALMERS, J.: “* * * These facts do not meet the requirements of a valid sale under the statute of frauds. The cotton was worth more than \$50. No part of the purchase money was paid, no memorandum in writing was made, and no portion of the goods were delivered unless these samples were. The delivery and receipt of samples, conceding that they took place, can only be held a compliance with the statute of frauds when they are considered and treated by both parties as constituting a part of the goods sold, and as diminishing the quantity of weight of such goods to the extent of their own bulk. * * * Where they are treated by the parties as specimens only of the goods sold, a delivery of them to the buyer does not satisfy the requirements of the statute of frauds. * * *”

Question 107: Is the delivery and acceptance of a sample, a delivery and acceptance of a part of the goods sold within the statute of frauds?

Sec. 74. Compliance by Payment in Whole or Part of Purchase Money in Case of Sales of Personal Property.

Case No. 108. Wier v. Hudnut, 115 Indiana 525.

Facts: “A” sold “B” 5,000 bushels of corn, the transaction being entirely oral, and it was agreed that B should furnish sacks to A for use in sacking the corn in part payment. These sacks were delivered by B to A, but when A had the corn ready for delivery B refused to take it. Being sued, he pleaded the statute of frauds, but A contended that there had been part payment, in the actual delivery of the sacks, making the statute inapplicable.

Point Involved: What will constitute payment to satisfy the statute of frauds?

ELLIOTT, J.: “* * * What the parties agree shall constitute payment, the law will adjudge to be payment. It is competent for parties to designate by their contract how and in what payment may be made. It is by no means true payment can only be made in money; on the contrary, it may be made in property or services. In short, whatever the parties agree shall constitute payment will be regarded by the Courts as payment, provided the thing agreed upon is of some value. * * * One of the old writers says that ‘If all or part of the money is paid in hand; or if I give earnest money albeit it be but a penny,’ the contract is valid. * * *”

Question 108: State the above case.

Case No. 109. Walker v. Nussey, 16 M. & W. (Eng.) 302.

PARKE, B.: “* * * The facts seem to be these. The plaintiff owed the defendant a sum of 4 l. 14 s. 11 d. The parties then verbally agreed that the plaintiff should sell to the defendant goods above 10 l. in value. * * * The plaintiff’s debt to go in part payment, and the residue to be paid by the defendant. No evidence was given of the *actual* payment or discharge of the debt due from the plaintiff, so all rested in the agreement merely.”

(The court holds that a mere agreement to apply an indebtedness in part payment is not enough. There must be an actual application made, as by a receipt given, or executed discharge made, a striking off to the other’s credit by some *overt* act in execution of the agreement to do so. For the statute requires *actual* payment.)

Question 109: State the above case.

C. The Writing as the Evidence of a Written Contract. (The Parol Evidence Rule.)

§ 75. The rule stated.

§ 78. Customs and usages.

§ 76. The writing incomplete.

§ 79. Void and voidable contracts.

§ 77. Where contract consists in
number of writings.

Sec. 75. The Rule Stated.

(Editor's Note: When a contract is reduced to writing, whether because the law requires it, or merely because the parties desire it to be in that more permanent form, the law considers that it is in that writing that the evidence of the contract is to be found, and, therefore, will not permit the introduction of oral or extrinsic evidence, whether consisting in utterances that are previous to or contemporaneous with the writing, to add to or any way alter, the effect of such written agreement. Otherwise, the writing would be at most *prima facie* evidence of the contract and subject to mutilation by the testimony of the parties. The law, therefore, says that if one puts his contract down in written form, it is to be presumed that such writing is his contract, and that it was so intended, and that there it must be found, and not elsewhere. See 16th Edition of Greenleaf on Evidence, Sec. 275, and Wigmore on Evidence, Chapter LXXXV. See also the following cases.)

Case No. 110. Seitz v. Brewers' Refrigerating Co., 141 U. S. 510.

Facts: The Brewers' Refrigerating Machine Co. sued Seitz on a written contract by which it agreed to supply and put in operation in defendant's brewery, a No. 2 refrigerating machine, of its own construction, for a certain price to be paid on certain terms. Defendant defends on the ground, first, that there was an implied warranty that the machine would accomplish certain purposes; second, that there was a collateral oral warranty that the machine would accomplish those purposes. The court decided that under the terms of the sale, defendant having gotten the very thing he bargained for, there was no implied warranty of fitness for any particular purpose.

Point Involved: Whether if a contract of sale is in writing of an apparently complete form, the court can receive evidence that an oral warranty was made as a part of that contract. Specifically, whether, if a writing covering a contract of sale seems complete, an oral express warranty contemporaneously made can be proved.

MR. CHIEF JUSTICE FULLER: “* * * The position of the plaintiff in error is, in the first place, that the evidence on his behalf tended to show an agreement between himself and defendant in error, entered into prior to or contemporaneously with the written contract, independent of the latter and collateral to it, that the machine purchased should have a certain capacity and should be capable of doing certain work, that the machine failed to come up to the requirements of such independent parol contract; that this evidence was competent; and that the case should therefore have been left to the jury.

“Undoubtedly the existence of a separate oral agreement as to any matter on which a written contract is silent, and which is not inconsistent with its terms, may be proven by parol, if under the circumstances of the particular case it may properly be inferred that the parties did not intend the written paper to be a complete and final statement of the whole of the transaction between them. But such an agreement must not only be collateral, but must relate to a subject distinct from that to which the written contract applies; that is, it must not be so closely connected with the principal transaction as to form part and parcel of it. And when the writing itself upon its face is couched in such terms as import a complete legal obligation without any uncertainty as to the object or extent of the engagement, it is conclusively presumed that the whole engagement of the parties, and the extent and manner of their undertaking, were reduced to writing. Greenl. Ev. 275.

“There is no pretence here of any fraud, accident or mistake. The written contract was in all respects unambiguous and definite. The machine which the company sold, and which Seitz bought, was a No. 2 size refrigerating machine, as constructed by the company, and such was the machine that was delivered, put up and operated by the brewery. A warranty or guaranty that the machine should reduce the temperature of the brewery to 40 degrees Fahrenheit, while in itself collateral to the sale, which would be complete without it,

would be part of the description and essential to the identity of the thing sold; and to admit proof of such an engagement by parol would be to add another term to the written contract, contrary to the settled and salutary rule upon that subject."

Question 110: State the facts in the above case, the question presented and the Court's decision.

Case No. 111. Forsyth Manufacturing Co. v. Castlen, 112 Ga. 199.

Facts: Castlen brought suit against the Forsyth Mfg. Co. on the following contract: "This agreement made and entered into this 25th day of April, 1898, by and between the Forsyth Manufacturing Company of the first part, and A. W. Castlen of the second part, both of the county of Monroe and the state of Georgia, witnesseth: that the party of the first part hereby agrees to pay the party of the second part six cents per pound for one hundred and fifty bales of lint cotton, to be delivered at the warehouse of the said Forsyth Manufacturing Company, on the Central Railroad, just above Forsyth, in good merchantable order, at times below set forth. The party of the second part hereby agrees to deliver at the place above designated one hundred and fifty bales of lint cotton, said cotton to be delivered to the Forsyth Manufacturing Company as follows: Fifty bales in September, fifty bales in October and fifty bales in November, 1898, at the place above set forth, and in good merchantable order, all bales to weigh more than 450 pounds each; and should the party of the second part fail or refuse to furnish the full amount of fifty bales each month, as above set forth, then the second party forfeits one-half cent per pound for each pound not delivered at the end of each month of the fifty bales." Castlen was a cotton planter, and the contract made was entered into upon his land upon which cotton was growing. The plaintiff Castlen tendered cotton according to his contract, but it was refused on the ground that it

was not raised on Castlen's land. The defendant now offers to prove that there was a contemporaneous oral agreement that the cotton should be raised on Castlen's land.

Point Involved: That a contract reduced entirely to writing cannot be modified by parol evidence. Specifically, that if goods are sold under a contract completely reduced to a writing which under the circumstances and upon the face of the contract seems complete, a collateral agreement that such goods shall be grown by the seller cannot be considered. Herein of the question when a contract is to be deemed wholly, and when partially, reduced to writing.

COBB, J.: “* * * When parties have reduced the agreement between them to writing, they must abide by the terms of the writing, whatever they may be, and nothing in the writing can be contradicted or varied by parol evidence. If, however, ‘a part of a contract only is reduced to writing (such as a note given in pursuance of a contract), and it is manifest that the writing was not intended to speak the whole contract, then parol evidence is admissible.’ Civil Code No. 3675 (1). ‘To bring a case within the rule admitting parol evidence to complete an entire agreement of which a writing is only a part, two things are essential. First, the writing must appear on inspection to be an incomplete contract; and second, the parol evidence must be consistent with and not contradictory of the written instrument.’ * * *

And a party is at liberty ‘to prove the existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, if from the circumstances of the case the court infers that the parties did not intend the document to be a complete and final statement of the whole of the transaction between them.’ * * *

It appears from the authorities above cited that in order to render parol evidence admissible for the purpose of making complete an incomplete contract, the fact that the contract is in-

complete must appear upon the face of the contract by reason of a patent ambiguity, or, although apparently complete on its face, in the light of evidence showing the circumstances surrounding the parties at the time the contract was executed, a latent ambiguity is made to appear. * * * There are many decisions by this court relating to this subject, but it would be useless to refer to or cite all of them. Enough have been cited to show that this court has recognized the rule, that in order to allow parol evidence to be admitted to show a collateral agreement it must appear, either from the contract itself or from the surrounding circumstances, that the contract is incomplete, and what is sought to be shown as a collateral agreement must not in any way conflict with or contradict what is contained in the writing. An examination of the cases decided by this court will show, we think, that this rule has been steadfastly adhered to. There may be some confusion in regard to the way in which it has been applied in some cases, and possibly there have been erroneous applications of the rule; but no case has been called to our attention where there has been any departure from this rule.

“It follows from what is above said, that the court did not err in refusing to allow the defendant to prove, as a collateral agreement between himself and the plaintiff, that the cotton specified in the contract was to be raised on the lands of the plaintiff. The contract between the parties evidenced by the writing calls for a certain number of bales of cotton of a certain description, and for no particular cotton. It is clear that, so far as the terms of the contract are concerned, the parties did not intend that the plaintiff should be limited to cotton raised by him.. It was a plain and unambiguous contract for the delivery of any cotton, answering to the description specified in the contract, which the plaintiff might see fit to offer to the defendant at the times specified in the contract. Such being the legal effect of the paper, parol evidence tending to show that the real contract was that the cotton was to be raised on the land

of the plaintiff contradicted and varied and altered the terms of the written instrument.”

Question 111: (1.) State the facts, the specific question presented and the Court’s decision in the above case.

(2.) How is it to be determined whether the contract is to be deemed wholly in writing or only partially so?

Sec. 76. The Writing Incomplete.

(Note: The two cases above bring out that if the writing is of an incomplete nature, the rest of the contract is provable, so far as the parol evidence rule is concerned. The completeness cannot be determined from the fact that more was said or agreed upon at the time than was reduced to writing, because the very statement of such a proposition is repugnant to the theory of the rule. The completeness of the contract must appear from the question whether (as Professor Wigmore says) there was an intention in *integrate* the act, as determined by the circumstances. There may be an intention to integrate a *part* of the act. Thus, in an executory contract of sale otherwise oral, a promissory note is given. The transaction as a whole, consisting partly in oral statements and partly in the note could be proved. But the *note* could not be altered by parol evidence. Thus if the note provided for six per cent, it could not be proved that it was orally agreed it should bear but five, in the absence of mistake or fraud.)

Sec. 77. Where Contract Consists in a Number of Writings.

Case No. 112. Professor John H. Wigmore, *A Treatise on the System of Evidence in Trials at Common Law*, Section 2425.

“When parties negotiate at a distance by letters and telegrams,—first an offer, then a declination, then a revision of the offer, then a halt upon an important term, afterwards an offer of its concession in return for the concession of some prior term now to be changed, and finally an acceptance of this concession, and thus an end of the negotiations,—where are the terms of this con-

tract to be found? Obviously, in this congeries of letters and telegrams, as mutually modifying and complementing each other. The whole of the contract is not in any one document. Nor, on the other hand, does the whole of any one document (probably) represent a part of the contract, because some of its terms have been impaired and replaced by other documents in the series. Nor can it be said that there is a series of legal acts, each one independent, successively modifying the preceding ones; for each letter and telegram is merely tentative and preparatory, and there exists no legal act (ante 2401, 2404) until the final assent is given. That assent, when it comes, adopts and vivifies the entire mass, which until then was legally inchoate only. The process was not unlike the fall of cards in the play of a trick at whist; the total effect cannot be determined till the last card has fallen, and no once card exhibits in itself the effect of the trick; yet, when all are played, the second card may prove to be the decisive factor and may remain unimpaired by any later play.

“On the other hand, if instead of leaving the net effect of the negotiations to be gleaned from the mass of writings, a single document is finally drawn up to replace them and to embody their net effect, and is signed or otherwise adopted by the parties, this document will now alone represent the terms of the act. Instead of leaving the wheat mingled with the chaff, the wheat has been definitely selected and set apart in a single mass. The wheat existed there, no less before than now, but it has now been placed in a single receptacle by itself.

“The process of embodying the terms of a legal act in a single memorial may be termed the integration of the act, i. e., its formation from scattered parts into an integral documentary unity. The practical consequence of this is that its scattered parts, in their former and inchoate shape, have no longer any legal effect; they are replaced by a single embodiment of the act. In other words: *When a legal act is reduced into a single memorial, all other utterances of the parties on that topic*

are legally immaterial for the purpose of determining what are the terms of their act."

Question 112: Explain how a contract may consist in a number of writings, and how a final document may take the place of all of them.

Sec. 78. Customs and Usages.

Case No. 113. Walls v. Bailey, 49 N. Y. 464.

Facts: Suit brought to recover a balance alleged to be due to plaintiffs for plastering defendant's house. The work was done under a written contract quoting prices at so much "per square yard." Plaintiffs did the work and charged defendant for the work done without deducting for *cornices, base boards, doors or windows*, claiming that it was a general custom not to deduct such spaces in determining the amount of space covered.

Point Involved: Whether a general custom known or which by reason of its general acceptance must be taken to have been known by both parties, enters into a written contract made by them which contains nothing inconsistent with such custom.

FOLGER, J.: "The contract between the parties was in writing. By it the plaintiffs were to furnish the material for the plastering work of the defendant's house, and to do the work of laying it on. The defendant was to pay them for the work and material a price per square yard. Of course, the total of the compensation was to be got by measurement. But when the parties came to determine how many square yards there were, they differed. The query was, the square yards of what? Of the plaster actually laid on, or of the whole side of the house calling it solid, with no allowance for the openings by windows and doors?

"And it is not to be said of this contract, that it was so plain in its terms as that there could be but one conclusion as to the mode of measurement, by which the num-

ber of square yards of work should be arrived at. It is in this case as it was in *Hinton v. Locke* (5 Hill, 437). There the work was done at so much per day. The parties there differed as to how many hours made a day's work. That is, what should be the measurement of the day? And there, evidence of the usage was admitted, not to control any rule of law, nor contradict the agreement of the parties, but to explain an ambiguity in the contract? And the proof showing a usage among carpenters that the day was to be measured by the lapse of ten hours, it was held a valid usage; and the contract was interpreted in accordance with it.

“ * * *

“So in the case before us. How shall the number of the square yards of work done be ascertained, is not so determinately reached by the language of the contract as that the law can say there was but one method in the minds of the parties, and this is it.

“And from the cases above cited, it appears that the meaning of words may be controlled and varied by usage; even when they are words of number, length or space, usually the most definite in language.

“Every legal contract is to be interpreted in accordance with the intention of the parties making it. And usage (with a limitation hereafter noticed), when it is reasonable, uniform, well settled, not in opposition to fixed rules of law, not in contradiction of the express terms of the contract, is deemed to form a part of the contract, and to enter into the intention of the parties.

* * *

“The jury in the case before us, have found the existence of the usage contended for by the plaintiffs, and upon evidence which well sustains the finding. The same evidence shows that the usage was uniform, continuous and well settled. Nor was it one which was in opposition to well settled principles of law, or which was unreasonable. * * *

“It would seem, however, that upon principle, for a party to be bound by a local usage, or a usage of a par-

ticular trade or profession, he must be shown to have knowledge or notice of its existence. (Id.) For upon what basis is it that a contract is held to be entered into with reference to, or in conformity with, an existing usage? Usage is engrafted upon a contract or invoked to give it a meaning, on the assumption that the parties contracted in reference to it; that is to say, that it was their intention that it should be part of their contract wherever their contract in that regard was silent or obscure. But could intention run in that way unless there was knowledge of the way to guide it? No usage is admissible to influence the construction of a contract unless it appears that it be so well settled, so uniformly acted upon, and so long continued, as to raise a fair presumption that it was known to both contracting parties, and that they contracted in reference thereto. (See *Rushforth v. Hadfield*, 7 East, 224). There must be some proof that the contract had reference to it, or proof arising out of the position of the parties, their knowledge of the course of business, their knowledge of the usage, or other circumstances from which it may be inferred or presumed that they had reference to it. (*Bodfish v. Fox*, supra, p. 96)."

Question 113: On what theory is a custom or usage considered a part of a written contract? In your opinion does it alter the terms of a written agreement? What must be true of the custom in order that it should control?

Sec. 79. Void and Voidable Contracts as Affected by the Rule.

Case No. 114. *Muskogee Land Co. v. Mullins*, 165 Fed. 179.

Facts: This was a suit brought by the Muskogee Land Co. against Mullins for rent alleged to be due on certain premises under the terms of a written lease, purporting to let the land for agricultural purposes. Defense that it was the intent of the parties that the land should be used for other and illegal purposes.

Point Involved: Whether a contract legal on its face and expressed to be for a legal purpose, may, as a matter of fact be shown to have been entered into for an illegal purpose.

ADAMS, CIRCUIT JUDGE: “* * * The land company contends that the face of the lease expressed the truth, and that the real purpose of the parties was to create in the lessee a lawful term of two years for agricultural purposes only.

“On this controlling issue of fact the writing is not conclusive. Parol evidence is always competent to show that a written contract, fair and lawful on its face, is in truth, contrary to law, morals or public policy. * * *”

Question 114: State the above case.

D. Oral and Implied Contracts.

§ 80. Validity of oral contracts.

§ 81. Implied contracts.

Sec. 80. Validity of Oral Contracts.

Case No. 115. McKennon v. Winn, 1 Okla. 327.

BURFORD, J.: “* * * (Quoting from Bishop on Contracts, Sec. 153.) ‘Every contract on whatever subject may be in oral words which will have the same effect as if written except when some positive rule of the common or statutory law has provided otherwise.’”

Question One Hundred and Fifteen: May a contract be orally made? What is the rule as to when it need not be in writing?

(Note: Contracts may be put in writing because the law for different purposes so requires it, or because the parties desire the more permanent and certain evidence of the writing. But *except* the law so requires, any contract may be oral. The validity of a contract and the evidence to prove it are different

things. It is the *general* rule that any contract may be oral. The law has made many *exceptions* to this general rule.)

Sec. 81. Implied Contracts.

Case No. 116. Hertzog v. Hertzog, 29 Pa. St. 465.

Facts: Suit brought by John Hertzog to recover from the estate of his father compensation for services rendered the latter in his life time. Plaintiff became 21 in 1825, but continued to reside with his father, who was a farmer, and to labour for him, until 1842. No express contract to pay him anything was proved.

Point Involved: Generally, of the definition and nature of implied contracts and the evidence to prove them. Specifically, whether, a son who resides at the home of his father and works for him, having no express contract with the father, can, after the work has been done, claim an implied promise to compensate him for such services.

LOWRIE, J.: “Express contracts are, where the terms of the agreement are openly uttered and avowed at the time of the making; as, to deliver an ox or ten loads of timber, or to pay a stated price for certain goods. Implied are such as reason and justice dictate; and which, therefore, the law presumes that every man undertakes to perform. As, if I employ a person to do any business for me, or perform any work, the law implies that I undertook and contracted to pay him as much as his labour deserves. If I take up wares of a tradesman without any agreement of price, the law concludes that I contracted to pay their real value.’

“This is the language of Blackstone, 2 Comm. 443, and it is open to some criticism. There is some looseness of thought in supposing that reason and justice ever dictate any contracts between parties, or impose such upon them. All true contracts grow out of the intentions of the parties to transactions, and are dictated only by their mutual and accordant wills. When this intention is expressed, we call the contract an express one. When it

is not expressed, it may be inferred, implied, or presumed from circumstances as really existing, and then the contract, thus ascertained, is called an implied one. The instances given by Blackstone are an illustration of this.

“But it appears in another place, 3 Comm. 159-166, that Blackstone introduces this thought about reason and justice dictating contracts, in order to embrace, under his definition of an implied contract, another large class of relations, which involve no intention to contract at all, though they may be treated as if they did. Thus, whenever, not our variant notions of reason and justice, but the common sense and common justice of the country, and therefore the common law or statute law, impose upon any one a duty, irrespective of contract, and allow it to be enforced by a contract remedy, he calls this a case of implied contract. Thus out of torts grows the duty of compensation, and in many cases the tort may be waived, and the action brought in *assumpsit*.

“It is quite apparent, therefore, that radically different relations are classified under the same term, and this must often give rise to indistinctness of thought. And this was not at all necessary; for we have another well authorized technical term exactly adapted to the office of making the true distinction. The latter class are merely *constructive* contracts, while the former are truly implied ones. In one case the contract is mere fiction, a form imposed in order to adapt the case to a given remedy; in the other it is a fact legitimately inferred. In one, the intention is disregarded; in the other, it is ascertained and enforced. In one, the duty defines the contract; in the other, the contract defines the duty.

“We have, therefore, in law three classes of relations called contracts.

“1. Constructive contracts, which are fictions of law adapted to enforce legal duties by actions of contract, where no proper contract exists, express or implied.

“2. Implied contracts, which arise under circumstances which, according to the ordinary course of dealing and the common understanding of men, show a mutual intention to contract.

“3. Express contracts, already sufficiently distinguished.

In the present case there is no pretense of a constructive contract, but only of a proper one, either express or implied. And it is scarcely insisted that the law would imply one in such a case as this; yet we may present the principle of the case the more clearly, by showing why it is not one of implied contract.

“The law ordinarily presumes or implies a contract whenever this is necessary to account for other relations found to have existed between the parties.

“Thus if a man is found to have done work for another, and there appears no known relation between them that accounts for such service, the law presumes a contract of hiring. But if a man’s house takes fire, the law does not presume or imply a contract to pay his neighbors for their service in saving his property. The common principles of human conduct mark self-interest as the motive of action in the one case, and kindness in the other; and therefore, by common custom, compensation is mutually counted on in the one case, and in the other not.

“* * * A party who relies upon a contract must prove its existence; and this he does not do by merely proving a set of circumstances that can be accounted for by another relation appearing to exist between the parties.

“* * *

“Every induction, inference, implication, or presumption in reasoning of any kind, is a logical conclusion derived from, and demanded by, certain data or ascertained circumstances. If such circumstances demand the conclusion of a contract to account for them, a contract is proved; if not, not. If we find, as ascertained circumstances, that a stranger has been in the employment of another, we immediately infer a contract of hiring, because the principles of individuality and self-interest, common to human nature, and therefore the customs of society, require this inference.

“But if we find a son in the employment of his father,

we do not infer a contract of hiring, because the principle of family affection is sufficient to account for the family association, and does not demand the inference of a contract. And besides this, the position of a son in a family is always esteemed better than that of a hired servant, and it is very rare for sons remaining in their father's family even after they arrive at age, to become mere hired servants. If they do not go to work or business on their own account, it is generally because they perceive no sufficient inducement to sever the family bond, and very often because they lack the energy and independence necessary for such a course; and they leave very seldomly because their father desires to use them as hired servants. Customarily no charges are made for boarding and clothing and pocket-money on one side, or for work on the other; but all is placed to the account of filial and parental duty and relationship.

“Judging from the somewhat discordant testimony in the present case, this son remained in the employment of his father until he was about forty years old; for we take no account of his temporary absence. While living with his father, in 1842, he got married, and brought his wife to live with him in the house of his parents. Afterwards his father placed him on another farm of the father, and very soon followed him there, and they all lived together until the father's death in 1849. The farm was the father's and it was managed by him and in his name, and the son worked on it under him. No accounts were kept between them, and the presumption is that the son and his family obtained their entire living from the father while they were residing with him.

“Does the law, under the circumstances, presume that the parties mutually intended to be bound, as by contract, for the service and compensation of the son and his wife? It is not pretended that it does. But it is insisted that there are other circumstances besides these which, taken together, are evidence of an express contract for compensation in some form, and we are to examine this.

“In this court it is insisted that the contract was that

the farm should be worked for the joint benefit of the father and son, and that the profits were to be divided; but there is not a shadow of evidence of this. And moreover it is quite apparent that it was wages only that was claimed before the jury for the services of the son and his wife, and all the evidence and the charge point only in that direction. There was no kind of evidence of the annual products.

“Have we then any evidence of an express contract of the father to pay his son for his work or that of his wife? We concede that, in a case of this kind, an express contract may be proved by indirect or circumstantial evidence. If the parties kept accounts between them, these might show it. Or it might be sufficient to show that money was periodically paid to the son as wages; or, if there be no creditors to object, that a settlement for wages was had, and a balance agreed upon. But there is nothing of the sort here.”

Question 116: (1.) State the facts, the question presented and the Court's decision in the above case.

(2.) Why is it erroneous to say that justice and reason creates contractual relationships between the parties?

(3.) On what reasoning is the inference raised that there is or is not a contract between parties in a given situation (there being no evidence of express contract between them)?

(4.) If the father and son in this case had had an *express* contract, what sort of evidence could have been introduced to prove it?

PART II

THE INTERPRETATION OF CONTRACTS

- Chapter Seven. General rules of interpretation.
Chapter Eight. Interpretation with respect to time of performance.
Chapter Nine. Interpretation of provisions as to damages or penalties in event of breach.

CHAPTER SEVEN

GENERAL RULES OF INTERPRETATION

- | | |
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| § 82. Object of interpretation to discover intent. | § 85. Customs and usages as governing meaning of words used. |
| § 83. Intent to be derived from language and conduct. | |
| § 84. Words used in technical or other special sense. | |

Sec. 82. Object of Interpretation to Discover Intent.

(Note: No cases seem advisable here. It is sufficient to state that the object of the interpretation of a contract is to arrive at the intention of the parties. The reason for this is obvious. A contract obligation is one that the parties have voluntarily assumed. It is the court's province to find out what the obligation was that the parties intended to be created. Any other rule would make a contract for the parties.)

It may be added, here, that the courts often say that if the language is plain and unequivocal there is nothing to construe. All rules of construction are for application to contracts of an ambiguous character.)

Sec. 83. Intent to Be Derived from Language and Conduct.

(Note: While the actual intent of the parties is to be sought, we are confronted with the limitation that we can only know the intent by the outward expression thereof. A party may actually mean one thing and say another. What he says, or in case of implied contracts or parts of contracts, what he *does* determines what he *intends*. To allow him to assert, afterwards, that his intention was otherwise would operate to the great injustice of the other party.)

Sec. 84. Words Used in a Technical or Other Special Sense.

(Note: If it is apparent that the parties use words in a technical or in any special sense, the court will define the words by such technical or special meaning. It must appear that both parties from their situation so understood the words.)

Sec. 85. Customs and Usages as Governing Meaning of Terms Employed.

Case No. 117. Souter v. Kellerman, 18 Mo. 509.

Facts: S. bought of K. packs of "4,000 shingles," and K. delivered packs containing 2,500 shingles. This suit was brought for the value of the alleged deficiency. K. defended that by a custom of the lumber trade, 2 packs of a certain size are regarded as 1,000 shingles and are always so bought and sold, without counting the number.

Point Involved: Whether if there is a general and well established usage in a trade or market, a contract will be governed thereby.

GAMBLE, J.: " * * * The usage of a particular trade is evidence from which the intention and agreement of the parties may be implied; and although it cannot control an express contract, made in such terms as to be entirely inconsistent with it, yet, in express

contracts, the terms employed may have their true meaning and force best understood by reference to such usage. * * * The usage must appear to be so general and well established that knowledge of it may be presumed to exist among those dealing in the business to which it applies, so that the contract of the parties may be taken to have been with reference to it. In this country many articles in terms sold by the bushel * * * are in fact sold by weight; * * * when such custom becomes general and well established, so as to be known to the community, it is obvious that a contract for a given number of bushels must mean the bushel as ascertained by weight. * * *

Question 117: (1.) What were the facts, the question presented and the Court's decision in the above case?

(2.) What must characterize the custom in order that it may control?

(3.) How may the operation of such customs be prevented in any particular contract?

CHAPTER EIGHT

INTERPRETATION WITH RESPECT TO TIME OF PERFORMANCE

§ 86. In a court of law.

§ 87. In a court of equity.

Sec. 86. In a Court of Law Time the Essence of Contracts.

Case No. 118. Cleveland Rolling Mill v. Rhodes, 121 U. S. 255.

Facts: The C. R. M. agreed to sell to Rhodes, a merchant at Chicago, the entire product of 14,000 tons of iron ore to be shipped as rapidly as possible during the season of navigation, in 1880, or such part as remained to be shipped on the opening of navigation in 1881. The C. R. M. shipped about 8,421 tons in 1880 and had on hand for shipment in 1881 at the opening of navigation 3,506 tons. It was not ready to fulfill its contract until nearly two months after the season opened in 1881. Rhodes refused to receive the shipments made in 1881.

Point Involved: Whether a provision in a contract as to the time for performance is to be construed literally, so that an unreadiness to perform at the very time, will (unless waived by the other side) constitute a breach.

MR. JUSTICE GRAY: "In a case decided upon much consideration at the last term, the general rule was stated as follows: In the contracts of merchants time

is of the essence. The time of shipment is the usual and convenient means of fixing the probable time of arrival with a view to providing funds to pay for the goods, or of fulfilling contracts with third persons. * * *

“When a merchant agrees to sell and to ship to the rolling mill of the buyer a certain number of tons of pig iron at a certain time, both the amount of iron and the time of shipment are essential terms of the agreement, the seller does not perform his agreement by shipping part of the amount at the time appointed and the rest from time to time afterwards, and the buyer is not bound to accept any part of the iron so shipped. * * * The necessary conclusion is that the defendant was justified in refusing to accept any of the iron shipped in 1881.”

Question 118: What do we mean by saying “time is of the essence” of a contract? What practical result follows the application of the doctrine?

Sec. 87. In a Court of Equity Time May or May Not Be of the Essence.

Case No. 119. Smith v. Brown, 10 Ill. 309.

TREAT, C. J.: “* * * The general rule in equity is, that time is not necessarily deemed of the essence of the contract, unless the parties have expressly so regarded it, or it necessarily results from the nature and circumstances of the contract. The parties may make time of the essence of their agreement, and when this clearly appears to have been their intention, and no peculiar circumstance has intervened to prevent or excuse a strict performance, it must be so considered and treated in equity. The right to make such agreements cannot be denied, and it is the duty of the courts to enforce them, as made, and not to make new contracts for the parties. The real intention of the parties must

govern, and that is to be determined from the contract and surrounding circumstances.”

Question 119: When will a court of equity deem time as of the essence?

CHAPTER NINE

INTERPRETATION OF PROVISIONS AS TO DAMAGES OR PENALTIES IN EVENT OF BREACH

§ 88. Introductory.

§ 89. Damages difficult of ascertainment and sum reasonable.

§ 90. Larger sum than debt payable on default of payment of debt.

§ 91. Same sum payable in event of breach of any of several covenants of varying importance.

Sec. 88. Introductory.

(Note: A word of explanation seems necessary as an introduction to this somewhat confusing subject. We are to consider whether a sum which is named in a contract as payable in the event of non-performance, is named as "liquidated damages" or as a "penalty." What do these terms mean? For instance, suppose that A contracts with B that B shall work for him for one certain week for a compensation of twenty-five dollars, and in the event of his failure to carry out the contract, that he shall pay A, \$100. B defaults. Can A recover the \$100? We will find that if the courts would say that A could recover, they would call the \$100 "liquidated damages," but if they would decide he could not recover the \$100, but must prove his actual damages they would call the \$100 a "penalty." Now we may notice, first, that the \$100 may or may not have any reference to A's actual damages, according to circumstances, and that

A's damages may or may not be readily ascertainable according to circumstances.

What is the purpose of the law in awarding damages? It is to put the injured party as near as may be in the position in which he would have been had the other party carried out his contract. Ordinarily there is no provision in the contract as to the measure of damages and the court would apply the rules of law established to the end of giving the injured party the damages he has actually sustained. Suppose, however, the parties *do* mention a sum as payable in the event of breach. The enforcement of that sum may give damages that are out of all proportion to the damages actually sustained. On the other hand, it may be a reasonable agreement entered into by the parties for the purpose of obviating the necessity of proving damages which may be very difficult if not impossible of ascertainment. Where such a provision is made, the law favors its construction as a *penalty*, that is, not enforceable as damages, but it also recognizes that the provision is a wise one and enforceable, where the nature of the contract makes the proof of damages difficult and the sum named is reasonable, that is, appears to have been put in, not arbitrarily, but with some reference to the damages that would be actually suffered.

At common law a provision as to an amount payable in a bond or other contract was enforceable without respect to the damages actually sustained. In the case of bonds, courts of equity established a jurisdiction to relieve against the penalty thereof, and to inquire into the damages, by providing that the amount of the penalty of the bond should stand as security, but that execution should not issue except for the damages caused by breach. By an English statute (8 and 9 Wm. III.) the law courts were directed to follow the rule of the equity courts, and today the penalty of the bond is never considered as recoverable except in so far as it represents actual damages.

Now it is apparent that even in the extreme case of

a penal bond, the law court regarded the provision as to the penalty as expressing the intention of the parties that such sum was to be recoverable, and allowed such sum to be recovered, yet that sum is not now recoverable, and today, knowing, as we do, the legal effect of a penal bond, the obligor never intends to pay nor the obligee to receive the penalty named. It provides merely a means of security.

In other contracts the difficulties appear. Shall a sum that is stated as payable if the contract is not performed, be regarded as a *penalty* and not enforceable, or shall it be taken as the agreed damages of the party injured? The courts often say that the intention of the parties will control. But we are met with two difficulties; first, how to ascertain the intention of the parties, and, second, suppose that the intention, when ascertained, violates all rules of damages and defeats justice. As a matter of fact, it is a good deal of a fiction to say that the courts will apply the intention of the parties. There are certain rules that help us to arrive at the solution whether to allow the sum mentioned to represent the damages, or not to represent the damages. And in arriving at that solution we are often violating the intention that is expressed as plain as words can express anything.

A few illustrations out of the great number that are reported in the books are given below under several headings and will serve to throw light on this subject.)

Sec. 89. Damages Difficult of Ascertainment and Sum Reasonable.

Case No. 120. Wallis Iron Wks. v. Monmouth Park Assn., 55 N. J. L. 132.

Facts: The W. I. W. agreed to complete a grandstand for a race course by a certain day or pay \$100 a day for every day thereafter that it remained incomplete, "which said sum * * * is hereby agreed upon * * * as the damages * * * and not by way of

penalty." When plaintiff sued, defendant claimed a right to reduce the sum recoverable by \$100 for every day's delay.

Point Involved: That an amount named as payable for every day's delay in a building construction contract, is enforceable if the damages agreed upon are reasonable in respect to all the circumstances.

DIXON, J.: In the present case the default consists of a breach of a single covenant. * * * It is plain that the loss to result from such a breach is not easily ascertainable. The magnitude and importance of the grandstand may be inferred from its cost, \$133,000. It formed a necessary part of a very extensive enterprise. * * * Its worth depended upon the success of the entire venture. How far the non-completion of this edifice might effect that success * * * were topics for conjecture only. The conditions therefore seem to have been such as to justify the parties in settling for themselves the measure of compensation. The stipulations of parties for specified damages on a breach of a contract to build have frequently been enforced by the Courts. * * *

"In the case at bar we have no data for saying that \$100 a day was unconscionable. * * *"

Question 120: (1.) What were the facts, the question presented and the Court's decision in the above case?

(2.) A, owning a retail clothing business in a town of 5,000 people, and having a good trade throughout that town and surrounding country, sold it to B, agreeing not to set up a rival business for ten years within the same town, and in event of doing so, to pay B \$5,000. A broke his agreement and B sues, proving the contract and A's breach thereof, but showing no actual damage. Do you think B can recover the \$5,000?

Sec. 90. Larger Sum Than Debt Payable in Default of Payment of Debt.

Case No. 121. Goodyear Co. v. Selz, Schwab & Co., 157 Ill. 186.

Facts: Suit on a contract for the monthly rental of certain machines to be computed on each month's output, payable on the first day of the month next following with a provision that if paid before the 15th of the month a discount of 50 per cent was to be allowed.

Point Involved: Whether the provision for the payment of a larger sum than the debt in the event the debt is not paid when due, is enforceable.

MR. CHIEF JUSTICE WILKIN: "The following propositions seem to be sustained by the authorities: 'Where a large sum, which is not the actual debt, is agreed to be paid in case of a default in the payment of a lesser sum which is the actual debt, such larger sum is always a penalty. But the rule is otherwise where a less sum is to be taken for a greater if paid at a certain time.' (5 Am. & Eng. Ency. of Law, 26.) 'Where the larger sum mentioned is the actual debt, and a smaller sum has been agreed upon as a release if paid under stated conditions, the failure to comply with the easier terms gives the creditor the right to enforce payment of the larger sum.' In doubtful cases courts have inclined to treat the stipulation as a penalty. (Ibid 27.)

"The controlling question in the case then is, what did the parties intend should be the actual rental for the machines—which sum was to be the actual debt? Manifestly, the draftsman of the lease intended it to be susceptible of the construction placed upon it by appellant, but it by no means follows that the parties who executed it so understood it or should be bound by that construction. We cannot construe the fifth paragraph as providing for a discount for prepayment of the debt. That a discount of 50 per cent should be made on the debt for a prepayment of but fifteen days is contrary to all business experience, and most unreasonable. The rent accruing for one month became due and payable on the first day of the calendar month following. Certainly the parties did not intend that there should be then due and payable more than 50 per cent of the schedule rate.

Only that amount was payable at any time between the first and fifteenth of the month. It is to be presumed that it was the intention of the parties to secure to the lessor the payment of reasonable compensation for the use of its machines, and no more. That compensation could not be one dollar if paid on the fifteenth, but double that amount if paid the next day. Therefore, to hold that it was intended, in a case like this, that the rent should be \$599.27 one day and \$1,198.53 the next, except as an inducement to prompt payment of the lesser sum, is unreasonable.

“Our conclusion is, that the fifty per cent clause of the instrument should be construed as requiring the payment of fifty per cent of the rent or royalty specified in the schedule for all boots and shoes made during one month to be paid on the first day of the next, and if not paid on or before the fifteenth of that month, the whole amount of the schedule rates to become payable. In other words, by the terms of the contract, properly construed, the actual debt was \$599.27, and the agreement to pay double the amount is in the nature of a penalty to insure the prompt payment of the sum actually agreed to be paid. *Longworth v. Askran*, 15 Ohio St. 370, is an authority sustaining this construction of the lease.”

Question 121: State the facts, the question presented and the Court's decision in the above case.

(2.) A sells goods to B for \$100, under an agreement that if B pays within thirty days he shall be entitled to a discount of 15 per cent. B does not pay within 30 days and claims that all he owes is \$85, and that the agreement to pay \$100 was an unenforceable promise to pay a penalty. Would you distinguish this from the above case? Why?

Sec. 91. A Certain Unvarying Amount Payable for Breach of Covenants of Varying Importance.

Case No. 122. *Wilhelm v. Eaves*, 21 Oregon, 194.

Facts: This case involved the breach of an agreement whereby Eaves agreed to appoint Wilhelm as superin-

tendent of a certain market and Wilhelm agreed to perform various duties as such superintendent, to keep the market clean and wholesome, to appoint special night watchmen, to keep open certain hours, etc. And the parties bound themselves "in the penal sum of \$200," "as fixed, settled and liquidated damages to be paid by the failing party to the other." Eaves discharged Wilhelm and he brought suit but proved no actual damages.

Point Involved: That if a contract provides for the payment of a certain amount of money in the event of the breach of any of several undertakings, which are of varying importance so that the actual damage would differ in each case, the sum will be deemed a penalty and the actual damages must be proved.

BEAN, J.: "* * * The decision of the question as to whether a given sum, provided in the contract, to be paid on a breach thereof, shall be considered as liquidated damages or as a penalty is often inherently difficult and there is much apparent conflict in the adjudged cases. The words 'liquidated damages' are not at all conclusive as to the character of the stipulation * * * and the Courts are not bound by the language used by the parties * * * and the tendency of the Courts is in favor of an interpretation which makes the sum a penalty.

"While it is usually said that the intention of the parties * * * is to govern in cases of this kind, 'such intention * * * is determined by very latitudinarian construction. To be potential and controlling that a stated sum is liquidated damages, that sum must be fixed as the basis of compensation and substantially limited to it; for just compensation is * * * the measure of damages. * * * Parties may liquidate the amount by previous agreement; but where a stipulated sum is evidently not based on that principle, the intention to liquidate damages will either be found not to exist or will be disregarded, and the stated sum treated as a penalty. * * *'

"* * * There may be deduced certain general rules.

* * * One of these rules is that when a contract specifying one certain sum as liquidated damages contains various stipulations * * * and the damages from the breach of some of which would be easily ascertainable * * * (and not as to the others), the stipulated sum will be regarded as a penalty and not liquidated damages, though the language of the parties be the strongest that could be employed to evince a contrary intent. * * *

“This rule is decisive of this case. This contract provides (for payment of \$200 in case of breach). If then, this be regarded as liquidated damages, that precise sum would be recoverable for the breach of any of the covenants, however unimportant, or however easily the damages for a breach thereof could be ascertained * * * the stipulated sum must be construed as a penalty (and actual damages assessed). * * *

Question 122: State the facts, the question presented and the Court's decision in the above case.

(2.) What does the Court state to be of controlling importance, in determining whether a sum is liquidated damages or a penalty?

PART III

THE OPERATION OF CONTRACTS

- Chapter Ten. The general rule. A contract operates to confer according to its tenor rights and obligations solely upon the parties thereto; with certain exceptions.
- Chapter Eleven. As an exception a contract operates to confer rights and obligations on undisclosed principals.
- Chapter Twelve. As an exception a contract operates to confer rights on beneficiaries thereto.
- Chapter Thirteen. As an exception a contract operates to confer power of assignment to others in certain cases.
- Chapter Fourteen. As an exception a contract operates to establish upon third persons a duty of non-interference.

CHAPTER TEN

THE GENERAL RULE; CONTRACT OPERATES SOLELY BETWEEN THE PARTIES

Sec. 92. The General Rule Stated.

(Note: A contract has been defined in the first part of this subject as a certain type of agreement between parties. It creates obligations that are voluntarily assumed between persons, each of whom has *chosen* the other as the party with whom he will deal. We may accordingly state it to be the general rule that a contract operates to confer according to its tenor, rights and obligations upon the parties to such contract and upon no other person. A party to the contract has the right to enforce it, and he is bound by it. But no other party can claim rights under such contract; and no other party is bound by its obligations. To this general rule there are certain very important exceptions to be treated in the following chapters.)

CHAPTER ELEVEN

EXCEPTION TO THE RULE; RIGHTS AND OBLI- GATIONS OF UNDISCLOSED PRINCIPALS

Sec. 93. This Exception Noted.

(Note: If an agent, possessing the authority to bind his principal on the particular contract made, makes such contract in his own name, not disclosing his principal, the principal has a right to enforce the liabilities of the third person on such contract and the third person upon discovering the principal may elect to hold such principal. As this subject is treated elsewhere (see the Cases on Principal and Agent) we may simply notice the subject at this point to indicate its bearing here and postpone its consideration to a later time.)

CHAPTER TWELVE

EXCEPTION TO THE RULE; RIGHTS OF BENEFICIARIES TO CONTRACTS

§ 94. General Statement.

§ 95. Creditor beneficiary may sue.

Sec. 94. General Statement.

(Introductory note: The right of a beneficiary who is not a party to a contract to sue thereon, has occasioned much discussion and much difference of opinion. It would not be advisable to attempt to review the authorities or to give anything like a general treatment of the subject here. With various qualifications, it seems fairly generally settled in the majority of the American states that one not a party to a contract but who will be benefited by the performance thereof, may sue if he is expressly mentioned or described in the contract as one upon whom a benefit is intended by the parties to be directly conferred and if he is what we may term a creditor beneficiary, that is one to whom an obligation is owing which is affected by the contract; but that any person who is merely *incidentally* affected, no matter in what measure, may not sue. Certain other rules have been followed in some cases as that a "donee beneficiary" may sue, or a "sole beneficiary," but it does not seem wise to attempt an extensive discussion of the subject for our purposes.)

Sec. 95. Creditor Beneficiary May Sue.

Case No. 123. Lawrence v. Fox, 20 N. Y. 268.

Facts: One Holly, at the request of the defendant loaned him \$300, stating at the time that he owed that sum to the plaintiff for money borrowed of him; and that he had agreed to repay it on the following day, and the defendant as a part of the transaction and in considera-

tion for the loan agreed to pay the money to the plaintiff. This is a suit against the defendant by the beneficiary of that agreement, to which he was not a party, and the defense is that not being a party thereto, and there being no privity of contract between plaintiff and defendant, plaintiff cannot sue on the agreement proved.

Point Involved: Whether a beneficiary to a contract between other parties, by which an obligation running to such beneficiary from one of the parties, is assumed by the other, can be enforced in a suit by the beneficiary.

H. GRAY, J.: “* * * As early as 1806, it was announced by the Supreme Court of this state * * * ‘That where one person makes a promise to another for the benefit of a third person, that third person may maintain an action on it.’ ”

Question One Hundred and Twenty-three: (1.) State the case of *Lawrence v. Fox*.

(2.) A, having a newspaper plant, sells the same to B, on B's promise as a part of the purchase price to pay A's creditors, one of the creditors sues B on this promise. Can he recover?

(3.) A contracts with B that he will erect for B a factory on land which is to be purchased from C, if C will sell at a certain price. C is not a party to the contract. A and B never proceed with the contract. C serves notice on A and B that he will sell for the price stated. Can he enforce the contract against A or B?

CHAPTER THIRTEEN

ASSIGNMENT OF CONTRACTS

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|--------------------------------|-----------------------------------|
| A. Introductory. | C. Power to assign as affected by |
| B. Power to assign contractual | present existence of the con- |
| rights and obligations without | tract. |
| consent of the other party to | D. Effect of assignment. |
| the contract. | E. What constitutes assignment. |

A. Introductory.

Sec. 96. In Explanation.

(Note: The subject of assignment of contract involves more than properly comes under the heading "Operation of Contracts," but it unquestionably involves that subject, and so we may for convenience treat the entire topic at this point. Does a contract operate to empower either party thereto to assign rights or obligations thereunder? If so, to what extent, how is such assignment effected, and what results follow from an attempted exercise of the power?

We must notice that the assignment might be made or attempted either with or without the consent of the other party to the contract. Obviously, it is the case of the lack of consent that presents difficulty, and when we speak of the power to assign rights or obligations we generally assume that the consent of the other party to the contract has not been obtained.

The transfer may be of rights or obligations. B employs A for a stated period on a salary. We have the following rights and obligations:

On A's part: *Obligation* to work for B. *Right* to salary on doing the work.

On B's part: *Right* to A's services. *Obligation* to pay salary.

Here A might attempt to transfer either his right to a salary or his obligation to perform services, or both. As his power of transfer might differ in the one case from that of the other, it becomes necessary to analyze in any case the nature of the thing attempted to be assigned.)

B. Power to Assign Contractual Rights and Obligations Without the Other Party's Consent.

§ 97. Assignment of contractual rights. § 98. Assignment of contractual obligations.

Sec. 97. Assignment of Contractual Rights.

Case No. 124. *Rodgers v. Torrent*, 111 Mich. 680.

Facts: Bill for an accounting. Complainant bases his case on an assignment to him of a share in moneys collected by the defendant.

Question: Whether a right to receive money already due under a contract is assignable.

MONTGOMERY, J.: “* * * If it be conceded, as we think it should be, that defendant could not be required to rely upon the complainant to perform that part of the contract that remains executory and which (another party) undertook to perform, the fact still remains that certain sums of money were to grow due under the contract to Alexander Rodgers (the assignor) at stated intervals, which he was at these times entitled to receive. The right to demand and receive these moneys we think is assignable. * * * It is one thing to say that a party may not be required to assume contract relations with another, and to rely upon such other to perform stipulations made with a third person, and another thing to hold that the right to recover money under a contract performed in whole or in part shall not be subject to assignment. * * *”

Question 124: State the facts, the question presented and the Court's decision in the above case.

Case No. 125. Re Wright, 157 Fed. 544.

NOYES, CIRCUIT JUDGE: "It may be conceded that this contract as a whole is based upon personal trust and confidence, and is not assignable. * * * But there is a difference between an absolute assignment of a contract and an assignment of rights under a contract. The personal confidence which precludes the transfer of rights arising out of a contract must be involved in the nature of the rights themselves. * * * It is not ordinarily involved in the right to receive moneys due or to grow due under a contract; and this right is generally assignable without the consent of the other party
* * *"

Question 125: A works for B at a salary of \$100 a month. Can he assign his salary to C?

A orders and pays for goods from the B Company. Can he assign the right to receive such goods to C?

(Note: Generally speaking mere rights under a contract, which are entirely separable from the obligations thereunder, are assignable, *except the right to personal services*, which is never assignable by the party entitled to the services, as one may choose for whom he will work.)

Sec. 98. Assignment of Contractual Obligations.

Case No. 126. Sloan v. Williams, 138 Ill. 43.

Facts: Dupuy, an attorney at law, made a contract with Williams by which Dupuy was to conduct suits, procure releases, etc., in order to perfect the title to certain lots owned by Williams. Dupuy before the performance of his part of the contract, purported to assign to Sloan all his interest therein. Sloan complains that Williams has refused to carry out his part of the contract.

Point Involved: Whether an obligation to render services involving peculiar or personal credit and skill, can be assigned without the consent of the party to whom such services are to be rendered.

MR. JUSTICE MAGRUDER: “* * * The main ground (of defense) is that the contract is one that calls for the personal services and skill of one of the parties thereto, and, therefore, not assignable. We think this objection is well taken. Dupuy was a lawyer * * * and, by the terms of the contract, was required to make use of his professional skill in perfecting the title to the lots by instituting and carrying on legal proceedings * * * and by the use of other methods. * * * A party who thus agrees to use his personal skill and knowledge, and has been contracted with by reason of the trust and confidence placed in him personally, cannot, while the agreement is still executory, substitute another in his place by assignment, in order to perform the service, without the consent of the other contracting party. * * * It is true that after the contract has been executed by the person * * * he may assign the right to recover compensation. * * *”

Question 126: What are the facts, the question presented and the Court's decision in the above case?

(2.) Suppose D, in the above case, had attempted to assign his right to fees earned by him personally under the above contract; would the assignment have been effectual?

Case No. 127. Demarest v. Dunton Lumber Co., 161 Fed. 264.

Facts: The facts are stated in the opinion.

Point Involved: The assignability of a contract to purchase lumber involving also the credit and individuality of the purchaser.

WARD, CIRCUIT JUDGE: “The plaintiff sues as assignee of a contract dated December 11, 1900, between W. E. Kelly & Co. and the Dunton Lumber Company, and complains that the defendant has failed and refused to deliver to him lumber covered by the contract. Under the contract the lumber company sold to Kelly & Co. the entire cut of white pine lumber for 1901, except so much

as it should need for its retail trade in the city of Rumford Falls, agreeing to retain, not the best of the lumber, but only an average grade for that trade. Delivery was to be f. o. b. cars at Rumford Falls, Kelly & Co. to pay within 10 days from date of invoice. The logs were to be cut in lengths of 12, 14, and 16 feet; but Kelly & Co. agreed to accept some lumber shorter than 12 feet, not less than 8 feet, and some longer than 16 feet. The trial judge held that this contract was not assignable, and that, therefore, the plaintiff had no right of action.

“While the authorities do not differ as to the principle that a contract personal in its nature cannot be assigned by one party without the consent of the other, they differ in the application of the principle; the question in each case being whether the contract is personal or not. The law on the subject for the federal courts has been laid down by the Supreme Court in *Arkansas Smelting Company v. Belding Mining Company*, 127 U. S. 379, 8 Sup. Ct. 1308, 32 L. Ed. 246, in which Mr. Justice Gray said:

“ ‘At the present day, no doubt, an agreement to pay money, or to deliver goods, may be assigned by the person to whom the money is paid or the goods are to be delivered, if there is nothing in the terms of the contract, whether by requiring something to be afterwards done by him, or by some other stipulation, which manifests the intention of the parties that it shall not be assignable. But every one has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent. In the familiar phrase of Lord Denman: ‘You have the right to the benefit you anticipate from the character, credit, and substance of the party with whom you contract.’ *Humble v. Hunter*, 12 Q. B. 310, 317; *Winchester v. Howard*, 97 Mass. 303, 305, 93 Am. Dec. 93; *Boston Ice Co. v. Potter*, 123 Mass. 28, 25 Am. Rep. 9; *King v. Batterson*, 13 R. I. 117, 120, 43 Am. Rep. 13; *Lansden v. McCarthy*, 45 Mo. 106. The rule upon this subject, as applicable to the case at bar, is well expressed in a recent English treatise: ‘Rights arising out of contract cannot be transferred,

if they are coupled with liabilities, or if they involve a relation of personal confidence such that the party whose agreement conferred those rights must have intended them to be exercised only by him in whom he actually confided.' Pollock on Contracts, 425.

"The contract under consideration is not merely for the sale of personal property for cash, but implies confidence in Kelly & Co., because they were to have 10 days' credit after title to the lumber passed to them, and because the amount of lumber shorter or longer than the lengths provided for in the contract which they were to accept was not fixed. So, also, the amount of lumber the lumber company needed for its retail trade was not fixed, and that amount, as well as the grade of lumber retained, were subjects which the lumber company might have been willing to leave open with Kelly & Co., but not with their assigns. The rights of Kelly & Co. were coupled with liabilities and involved personal confidence. See, also, *Snow v. Nelson* (C. C.), 113 Fed. 353.

"The plaintiff did not rely upon the assignability of the contract alone, but alleged in the complaint that it was assigned, and Van Horn (plaintiff's assignor) substituted in place of Kelly & Co. with the approval and consent in writing of the lumber company. The evidence relied on to sustain these allegations is all documentary, and we agree with the trial judge that it fails to do so. Some of the letters, taken alone, indicate a consent; but, read all together, the conclusion that the lumber company never assented to the assignment, and that Kelly & Co. acquiesced in its refusal to do so, is irresistible. In the letter of March 21, 1903, written to the lumber company after it had refused to make further deliveries, Kelly & Co. say, among other things:

" 'We have a contract with you under date of the 11th day of December, 1900, whereby you agreed to furnish us a specific amount of lumber during the year 1901.
* * * We hold that you have no right to nominate the party with whom you will or will not do business as our representative, and we now say to you that we will

hold you for any damages that may arise or have arisen from the fact of your not having furnished this lumber to us in the time in which you agreed to furnish it. * * *

We state again all we want is that you shall fill your contract with us and we will do the same with you, and if you refuse to do it you may as well understand first as last that we will endeavor to make you pay damages as well as fill the contract. We trust you will see the matter as we do, but if you do not care to consider it in a reasonable manner, you may begin action, or we will, and the sooner the better.'

"The judgment is affirmed."

Question 127: (1.) State the facts, the question presented and the Court's decision in the above case.

(2.) What did the United States Supreme Court hold in the Arkansas Smelting Co. case?

(3.) B agreed to supply K, a cake manufacturer, all the eggs required in K's business for one year, K agreeing not to buy elsewhere during that period. Statements of account were to be rendered every fourteen days, B to draw for the amount at two months from date of delivery. K thereafter purchased another company, and then transferred the old and new business to a new company called George Kemp, Limited, of whose 20,000 shares he held all but seven. When B heard of this amalgamation he refused to supply the eggs to the new company and claimed that his contract was at an end. K sues, claiming breach. Can K recover? (*Kemp v. Baerselman* (1906), 2 K. B. (Eng.) 604, 2 British Ruling Cases, 436.)

C. Power to Assign as Affected by Present Existence of the Contract.

Sec. 99. Contractual Rights to Be Acquired in the Future.

Case No. 128. *Mulhal v. Quin*, 1 Gray, 105.

Facts: An attempted assignment of rights to arise under a contract expected to be made, but not yet made, with the City of Boston.

Point Involved: Can one assign rights under a contract which is not yet in existence?

SHAW, C. J.: “* * * There was no subsisting engagement under which wages were to be earned, and it depended altogether upon a future engagement, whether anything would ever become due. * * *

“None of the cases go so far as to hold that the mere possibility * * * of earning wages * * * employment at a future time is capable of being assigned. The debt may be conditional, uncertain as to amount or contingent, but * * * must be an actual or possible debt, due or to become due. * * *,”

Question 128: State the above case.

Case No. 129. Mallin v. Wenham, 209 Ill. 252.

Facts: M was employed by A & Company at a salary of \$100 per month. He had no definite contract of employment, but was employed by the month. He could have quit or A & Company could have discharged him at any time without liability. To secure a loan from W he executed an instrument stating: “I do hereby transfer, assign and set over to C. F. Wenham * * * all salary or wages due or to become due me from Armour & Co. * * *.” M now contends that this assignment was invalid.

Point Involved: The assignability of wages to be earned under an existing contract of employment of indefinite duration.

MR. JUSTICE RICKS: “* * * An assignment of wages to be earned in the future under an existing employment is valid. * * * It is not necessary that there be an express hiring for a definite time, but the existence of the employment at the time of the assignment is sufficient. In the case at bar, appellant was * * * in the actual employment of Armour & Company at a fixed price per month. It is true that such

employment was not of any definite duration, and appellant might abandon the same at any time or his employer might discharge him. The subject matter of the contract had but a potential existence, but it was such a property right as might legally be disposed of. * * *

Question 129: State the doctrine of the above case.

D. Effect of Assignment.

§ 100. The liability of assignor to assignee.

§ 101. The liability of the assignor to the other party to the contract.

§ 102. The assignee as the successor to the title of the assignor.

§ 103. The notice necessary to protect the assignee's rights.

Sec. 100. The Liability of the Assignor to the Assignee.

Case No. 130. *Tyler v. Bailey*, 71 Ill. 34.

Facts: A assigned to B seven land warrants. They turned out to be counterfeits. B sues A.

Point Involved: Whether one who assigns a chose in action, warrants it to be what it purports to be.

MR. JUSTICE WALKER: “* * * A person who sells personal property is always understood as warranting the title, and as a general if not a uniform rule, a person passing bills or commercial paper, or selling a chose in action is understood and held as guarantor of the genuineness of the instrument, and this whether he does so in terms, or is silent when the transfer is made.

* * *

Question 130: State the above case.

(Note: In the assignment of a contract *to be performed* there is no implied warranty by the assignor that it will be performed. His undertaking is confined to the warranties that he has title, and that his right is valid and subsisting as what it purports to be. The assignee takes the risk that an executory contract will be performed.)

Sec. 101. The Liability of the Assignor to the Other Party to the Contract.

Case No. 131. Grommes v. St. Paul Trust Co., 147 Ill. 634.

Facts: A was B's tenant. With B's consent he transferred his lease to R, who entered into possession and for a time paid rent and then defaulted. B sues A for accruing rent.

Point Involved: Whether the lessee continues liable on the lease (as surety) on its assignment with the consent of the lessor.

MR. JUSTICE MAGRUDER: “* * * Nor did the sale of the saloon by the tenant to Rose, nor the acceptance of rent from the latter by the landlord operate as a discharge (of the original lessees). The assignee of a leasehold estate is liable for the rent accruing. * * * In case the rent is not paid by the assignee as it becomes due, an action may be sustained against the lessee therefor; and it makes no difference in this respect that the lessor may have received rent from the assignee and accepted him as a tenant in the premises. * * * If there be not a substitution of the assignee in place of the original lessee, and a clear intent to make a new contract with the former and to discharge the latter from further liability under the lease, both will be held liable to the lessor.”

Question 131: (1.) State the facts, the question presented and the Court's decision in the above case.

(2.) What would release the original lessee?

Sec. 102. The Assignee as the Successor to the Title of the Assignor.

Case No. 132. Westfal v. Jones, 23 Barb. (N. Y.) 9.

Facts: J. gave a mortgage on his lands to P., who assigned to W., who now seeks to foreclose against J. The transaction between J. and P. was illegal and fraud-

ulent, but W. knew nothing of this and paid value for the mortgage. This is a suit to foreclose the mortgage.

Point Involved: Whether an assignee of a mortgage (or any non-negotiable paper) takes the title subject to the defenses claimed by the obligor but unknown to the assignee.

WELLS, J.: “* * * Does the plaintiff, being a bona fide purchaser and assignee * * * stand in any better condition than the person from whom he derived his title? It is a well settled principle that the assignee of a *chose in action* takes it subject to all equities which existed against it in the hands of an assignor. * * * If he had no right to recover before the assignment, it seems perfectly clear he could confer none upon another. *Persons purchasing this class of securities can always protect themselves by inquiring of the obligors whether they are valid;* and if they purchase upon the faith of the obligor’s representations that the securities are valid, the latter would clearly be estopped from setting up the contrary.”

Question 132: (1.) State the facts, the question presented and the Court’s decision in the above case.

(2.) A employed by B assigned his right to money due from B. In a suit by the assignee B set up that A, before the assignment, was liable for a failure to fulfil his contract to sell at the highest market price. C, the assignee, knew nothing of this defense at the time he accepted the assignment, and he paid A the full face value of the money due from B. Is the defense good against C? (*McKenzie v. Hodgkin*, 126 Cal. 591.)

(3.) A, an employee of B, is accustomed to receive his salary from B at the end of every month. On the first of July he asks B to advance him his July salary, which B does. On July 30 A goes to the office of C, a money lender and borrows a sum of money from him, assigning his July salary (which is not known to C to be paid) as security therefor. On August first A is rightfully discharged by B. On August 31st A, not having worked during the month, goes to D, another money lender, and purports to assign his August salary, which he represents to be

earned and unpaid. C and D having given notice, and being refused payment, begin suit against B. Can either recover?

(Note: Negotiable paper has a peculiar property of assignability (known as negotiability) which enables a holder in due course, i. e., a purchaser for value, before the paper is over due, without notice, to take a better title than the seller had. See the subject of Negotiable Paper, in the cases upon which, it will appear that the defenses of fraud, payment before maturity, failure or lack of consideration, and the like, cannot be made against a holder in due course.)

Case No. 133. Mott v. Clark, 9 Pa. St. 399.

ROGERS, J.: "It is a general and well settled rule * * * that the assignee of a chose in action takes it subject to the same equities it was subject to in the hands of the assignor. * * * But this rule is generally understood to mean the equity residing in the original obligor or debtor and not an equity residing in some third person against the assignor. * * * The assignee can always go to the debtor and ascertain what claims he may have against the bond or other chose in action, which he is about purchasing. * * * But he may not be able with the utmost diligence to ascertain the latent equity of some third person against the obligee. He has not any object to which he can direct his inquiries."

Question 133: What does this case decide?

Sec. 103. Notice Necessary to Protect Assignee's Rights.

Case No. 134. Harvin v. Galluchat, 28 S. C. 211.

Facts: A owed B a sum of money. B assigned his rights to C. Afterwards, and before C had notified A of the assignment, A, not knowing of the assignment, paid B. This is a suit by C against A.

Point Involved: Must the assignee protect his title by notifying the debtor?

MR. CHIEF JUSTICE SIMPSON: “* * * It is laid down in all the authorities upon the subject of assignment of unnegotiable paper * * * that in order to protect his rights, under an assignment, the first duty of the assignee is to *give notice* to the debtor. A failure to do this places the assignee at the peril of losing the debt either by a subsequent assignment to another party, or new defenses existing between the assignor and the debtor, or a payment by the debtor to the assignor.

Question 134: State the rule of the above case.

(Note: Here also negotiable paper differs from other forms of obligation. One who buys negotiable paper is under no obligation to notify the holder of the paper that he has acquired it. He may safely rest upon the rule that the debtor, knowing the negotiable character of the paper, will not pay it except to the holder thereof.)

E. What Constitutes Assignment.

Sec. 104. What Constitutes Assignment.

Case No. 135. Holbrook v. Payne, 151 Mass. 383.

Facts: P. having done some work for the town of Winchester, gave the following writing to one Cutting:
Winchester, July 12, '88.

“Town of Winchester:

“Pay to the order of A. Cutting, ninety and thirty-two hundredths dollars. Value received, and charge the same to the account of H. B. Payne.”

The Town of Winchester never accepted this order. The question was whether C, by the mere force of such order, became entitled to the funds, if any, owing P.

Point Involved: Whether an order to pay money, specifying no particular fund, is an assignment.

HOLMES, J.: “* * * There is no doubt that an order for a specific fund, identified by the order itself, may be good assignment. * * * On its face the order

given to the claimant by the defendant does not refer to a particular fund or debt, but is an ordinary negotiable draft, or unaccepted bill of exchange, drawn upon the town, upon the general credit of the drawer. * * *

The fact that the order is a negotiable instrument on its face shows that it is not drawn against a particular fund. If it were drawn against a particular fund it would not be negotiable. * * *

The case is stronger for holding a check upon a bank to be an assignment. * * *

Yet the weight of authority is that a check is not an assignment. * * *

Question 135: State the question involved in the above case and the Court's decision.

(2.) Is a check on a bank an assignment of the fund in the bank?

(Note: To hold that the order in the above case is not an assignment does not indicate that it has no legal effect. As a matter of fact, it is, as the case states, a bill of exchange, and being accepted creates a personal liability on the acceptor. Before acceptance the drawer has a liability, which also in a secondary sense continues after acceptance.)

Case No. 136. In re Hanna, 105 Fed. 587.

An instrument to the following effect was held to constitute an assignment. "To T. Please pay to the order of P, \$281.88 out of any balance due us remaining in your hands."

Question 136: State this case.

CHAPTER FOURTEEN

INTERFERENCE WITH CONTRACTUAL RELATIONSHIPS BY THIRD PERSONS

Sec. 105. Operation of Contract to Create a Right of Non-Interference by Third Persons.

Case No. 137. London Guarantee Co. v. Horn, 206 Ill. 493.

Facts: This is a suit brought by Gustave Horn against the L. G. Co. to recover damages alleged to have been caused him by the defendant in procuring his discharge by Arnold, Schwinn & Co. of Chicago, as a foreman of the frame department of its bicycle factory. He alleged that he was injured while operating a milling machine and that he had a claim on that account against Arnold, Schwinn & Co.; that his employers carried insurance against loss by damage claims of employees, and that the insurance company procured his discharge because he would not settle at a small amount offered by them. He was not employed for any particular time and could have been discharged by his company at any time and for any reason, without liability on the employer's part, but he alleged and produced evidence tending to prove that the sole reason he was discharged was the interference of the insurance company.

Point Involved: Whether a person has a cause of action for damages against another who interferes to pro-

cure his discharge by his employer, even though he was not employed for any particular time, and could have been rightfully discharged at any time by his employer, the reason for such interference being his refusal to settle a cause of action upon which the party procuring the discharge was liable as insurer? Inferentially, whether a third person is liable who maliciously interferes to cause a breach of any contract, and what constitutes malice therein?

MR. JUSTICE SCOTT: “* * * We have been favored with most elaborate and exhaustive briefs by counsel for both parties. The case principally relied upon by counsel for appellant is that of *Allen v. Flood*, 67 L. J. Q. B. 119, decided by the House of Lords in 1897. This case has excited a wide discussion, and was considered at length by this court in *Doremus v. Hennessy*, 176 Ill. 608. In this English case certain boiler-makers, members of a trade union, in common employment with the plaintiffs, who were shipwrights, members of a rival organization, working on wood, objected to working with the latter on the ground that in a previous employment they had been engaged on iron work, it being contrary to the regulations of the union to which the boiler-makers belonged for shipwrights to do work of that character. Allen, as a representative of the boiler-makers, saw the manager of their employer, to whom he stated that if the shipwrights, who were engaged from day to day, were not dismissed, the boiler-makers would leave their work or be called out by their union. The shipwrights were thereupon discharged and brought an action against Allen. Their right to recover was denied, principally upon the ground that every workman has a right to exercise his own option with regard to the persons in whose society he will agree to continue to work, and that when the employer was confronted with a situation where he would lose the services either of the boiler-makers or the shipwrights, he had the right to elect which class of workmen to discharge, and electing to discharge the ship-

wrights, both he and the boiler-makers were within their legal rights and no cause of action arose.

“* * *

“In *Quinn v. Leatham*, App. Cas. of 1901, p. 495 (decided by the House of Lords), Lord Macnaghten, in speaking of *Allen v. Flood*, stated that its head-note might well have run in these words: ‘An act which does not amount to a legal injury cannot be actionable because it is done with a bad intent,’ and in this case last referred to it is said, that ‘it is a violation of legal right to interfere with contractual relations recognized by law, if there be no sufficient justification for the interference.’

“We are of opinion that the contention of appellant in the case at bar, to the effect that competition in trade, employment or business is such a justification, is in accord with the authorities. This view finds support in the case of *Chambers v. Baldwin*, 15 S. W. Rep. 57, where it was held that a party to a contract for the sale of goods cannot maintain an action against one who maliciously, and with design to injure him and to benefit himself by becoming a purchaser in his stead, advises and procures the other party to break the contract.

“* * *

“In our judgment the cases cited by appellant, in so far as they lend support to its theory, will be found to be cases where the party who secured the discharge of the employee was in some way in competition with that employee in the business or work in which the employee was then engaged, or was a member of some organization which was in competition with the employee or some organization to which that employee belonged, and the fact that such competition existed has been treated by some of the courts as justification for the act of the defendant in bringing about the discharge. * * * While it is true that the temporal interests of Horn and appellant were involved in the negotiations between them, we believe that the authorities which look upon competition as a justification for the act of one party in securing the

discharge of an employee have regarded the term in a more restricted sense, and given to the term 'competition' its ordinary meaning and signification. This conclusion is certainly warranted by the reasoning in *Doremus v. Hennessy*, *supra*, where this court discusses competition as a defense to an action of this character. It cannot be held that appellee and appellant were, in any ordinary sense of the term, in competition with each other. It is also to be observed that the injury which it was sought to visit upon Horn was not primarily to subject him to a deprivation of his employment, but was to compel him to surrender a right not connected with his employment. If the only object of appellant had been to secure appellee's discharge for the purpose of obtaining his position for another, or for the reason that the employment of appellee by Arnold, Schwinn & Co. in some way conflicted with the right of appellant, or some organization to which it belonged, to obtain the same or similar employment, a very different question, and one not now before this court, would be presented, and *Allen v. Flood*, *supra*, and other cases of that character cited by appellant, would then be worthy of greater consideration.

"It is further contended on the part of appellant, that while the evidence may have shown that it was animated by malice, in the ordinary acceptation of the term, toward Horn, the proof fails to show any legal malice. In this connection it is argued that appellant had the right to have Horn discharged under the terms of the contract, or if it did not have that right, that it seriously and in good faith believed that it had, and that it is thereby relieved of any imputation of malice. There is no provision in the policy which by the wildest stretch of the imagination could be held to give any such right to appellant, and its conduct in attempting to secure a settlement of this claim shows it to have been animated by a wanton disregard of the rights of the appellee. He was first told by the attorney of appellant that unless he settled for a trifling amount appellant would have him discharged by Arnold, Schwinn & Co.,—a threat to do

that which this attorney must have known his client had no right to do. Afterward Robinett, the agent for the company, made the same threat, and upon his attention being called to the fact that the policy gave him no power to require Horn's discharge, he said to Arnold, Schwinn & Co.: 'If you don't discharge him I will have to cancel this policy today. I am here to bring this case to a focus today, and if you refuse to lay him off I will cancel it.' When Mr. Robinett made this threat, which resulted in appellee's discharge, he was making a threat to do an unlawful thing,—to do a thing which appellant, by the terms of the contract, had no right to do. The contract provided only for its cancellation upon five days' notice. It is not pretended that any such notice had been given, but Robinett secured Horn's discharge by threatening to cancel the contract 'today.' We think it perfectly apparent that the attorney for appellant, and its agent, Robinett, each sought to bring about, and finally did bring about, the discharge of appellee by threatening to do acts which each, respectively, knew he had no right to do.

"Malice, in its legal sense, means a wrongful act done intentionally, without just cause or excuse; the willful violation of a known right. (19 Am. & Eng. Ency. of Law,—2d ed.—p. 623.) Were the acts of appellant wrongful?

“* * *

"Arnold, Schwinn & Co. had the undoubted right to discharge Horn whenever it desired. It could discharge him for reasons the most whimsical or malicious, or for no reason at all, and no cause of action in his favor would be thereby created; but it by no means follows that while the relations between Arnold, Schwinn & Co. and Horn were pleasant, and while, as the evidence shows, it was the expectation of the company that Horn would continue in its employ 'all the year around,' that the interference of appellant, whereby it secured the employer to exercise a right which was given it by the law, but which, except for the action of appellant, it would not have exercised, is not actionable.

“* * *

“In our own State, the case of *Doremus v. Hennessy* is first reported in 62 Ill. App. 391. Plaintiff there kept a laundry office, where she received clothing which her patrons desired to have laundered. She would then procure persons operating laundries to do the work and return the garments to her for delivery to her customers. The defendants were members of the Chicago Laundrymen’s Association. She charged, by her declaration, that the defendants, by false representations and by threats and intimidation, induced certain parties who had been doing the work for her to break their contracts and engagements with her. The Appellate Court, after stating that it is now well established that in civil actions the conspiracy is not the gravamen of the charge but may be pleaded and proved in aggravation of the wrong, declares the law to be, that an action may be maintained for the malicious interference with the business of another, his occupation, profession or way of obtaining a livelihood, and affirmed a judgment of \$6,000 in favor of the plaintiff. The case came to this court, where it is reported in 176 Ill. 608. The judgment of the Appellate Court was affirmed, and it appears from the statement of facts made by this court that with some of the persons who did work for her the arrangement was that they would do her work as long as the laundry association did not interfere, and that these persons, among others with whom she had contracts for specific periods, were induced by threats made by the laundry association to cease connection in business with appellee. Appellants contended that their acts were not mere malicious acts, done solely with the intent to injure plaintiff’s business, but were in the line of legitimate competition. It was there said by this court (p. 614): ‘No persons, individually or by combination, have the right to directly or indirectly interfere or disturb another in his lawful business or occupation, or to threaten to do so, for the sake of compelling him to do some act which, in his judgment, his own interest does not require. Losses willfully caused by another, from motives of malice, to

one who seeks to exercise and enjoy the fruits and advantages of his own enterprise, industry, skill and credit, will sustain an action. It is clear that it is unlawful and actionable for one man, from unlawful motives, to interfere with another's trade by fraud or misrepresentation, or by molesting his customers or those who would be customers, or by preventing others from working for him or causing them to leave his employ by fraud or misrepresentation or physical or moral intimidation or persuasion, with an intent to inflict an injury which causes loss.' It is true that in the additional opinion delivered upon the petition for rehearing Mr. Justice Phillips distinguishes the case of *Allen v. Flood*, by pointing out the fact that in the latter case there was no contract the breach of which was induced by the defendant, while in the *Doremus* case contracts existed in which the plaintiff had a property right and which were broken as a result of the actions of the defendants; but, as we have already seen, the clear weight of authority is to the effect that where the contract is one of employment, it is immaterial whether it is for a fixed period or is one which is terminable by either party at will, both parties being willing and desiring to continue the employment under that contract for an indefinite period.

"We therefore conclude, both upon reason and authority, that where a third party induces an employer to discharge his employee, who is working under a contract terminable at will, but under which the employment would have continued indefinitely, in accordance with the desire of the employer, except for such interference, and where the only motive moving the third party is a desire to injure the employee and to benefit himself at the expense of the employee by compelling the latter to surrender an alleged cause of action, for the satisfaction of which, in whole or in part, such third party is liable, and where such right of action does not depend upon and is not connected with the continuance of such employment, a cause of action arises in favor of the employee against the third party.

Question 137: (1.) State briefly the facts, specific question presented and the Court's decision in the above case.

(2.) What was the case of *Allen v. Flood*?

(3.) What constitutes malice in its legal sense?

(4.) What was the case of *Doremus v. Hennessy*?

PART IV

DISCHARGE OF CONTRACTS

Chapter 15. Meaning of discharge.

Chapter 16. Discharge by performance, breach, tender, impossibility and payment.

Chapter 17. Discharge by agreement, merger, novation, alteration and operation of law.

CHAPTER FIFTEEN

MEANING OF DISCHARGE

Sec. 106. Discharge Defined.

(Note: By discharge of contract we mean that the contract has lost its force as such, that the contractual tie between the parties has been removed. We know from a former part of our study that there are certain causes for which one may *withdraw from* (avoid) his contract and in that way remove the tie. In those cases we assume that the tie never became firmly binding, that on account of fraud, duress, undue influence and the like, the tie was faulty and might be undone by one of the parties. We now assume the case of a *binding* contract from which neither party can withdraw, a tie that he cannot undo because of a fault in its execution but by *performing* the thing for which he bound himself to the other, or by showing something accepted as performance or in the eyes of the law equivalent thereto or an excuse therefor. Assuming then that the parties are bound by the contractual *nexus*, how may the relationship cease, so that either can say that, though he was under contract, the contract exists no longer.

The various ways in which a contractual obligation may be discharged are indicated at the beginning of this chapter, and are illustrated by the cases following.)

CHAPTER SIXTEEN

DISCHARGE BY PERFORMANCE, BREACH, TENDER AND IMPOSSIBILITY

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| § 107. The performance must be according to the terms of the contract. | § 111. Breach by renunciation prior to time of performance. |
| § 108. Substantial performance sufficient. | § 112. Dependence and independence of covenants and conditions as affecting performance and breach. |
| § 109. Acceptance of defective performance as full performance. | § 113. Impossibility of performance as discharge. |
| § 110. Performance of contracts to be performed to the other's satisfaction. | |

Sec. 107. The Performance Must Be According to the Terms of the Contract.

Case No. 138. Bowes et al. v. Shand et al., 2 App. Cas. (Eng.) 455.

Facts: Shand agrees to sell B. a cargo of rice, under a contract, which, as construed by the Court, required S. to put the rice on board the "Rajah of Cochin" in Madras in March and April, for shipment to London. The rice was put on board in February, and B. refused to accept it. This was an action for damages caused by such refusal.

Point Involved: Whether a party may, without respect to its importance, insist on every term of his contract.

LORD BLACKBURN: * * * It was argued * * *

that it was enough that it was rice and that it is immaterial when it was shipped. * * * If you contract to sell peas, you cannot oblige a party to take beans. If the description of the article tendered is different in any respect, it is not the article bargained for * * *. I think in this case what the parties bargained for was rice, shipped at Madras, or the coast of Madras. Equally good rice might have been shipped a little to the north or a little to the south of the coast of Madras. I do not quite know what the boundary is, and probably equally good rice might have been shipped in February as was shipped in March, or equally good rice might have been shipped in May as was shipped in April, and I dare say equally good rice might have been put on board another ship as that which was put on board the "Rajah of Cochin." But the parties have chosen, for reasons best known to themselves, to say: We bargain to take rice, shipped in this particular region, at that particular time, on board that particular ship, and before the defendants can be compelled to take anything in fulfilment of that contract, it must be shown not merely that it is equally good, but that it is the same article that they have bargained for—otherwise they are not bound to take it.

Question 138: What is the rule stated in the above case?

Sec. 108. Substantial Performance Sufficient.

Case No. 139. Nolan v. Whitney, 88 N. Y. 648.

Facts: Michael Nolan contracted to do the mason work in the erection of two buildings in Brooklyn, for \$11,700 to be paid in installments as the work progressed. The last installment of \$2,700 was payable 30 days after completion and acceptance of the work. The work was to be performed to the satisfaction and under the direction of an architect, whose certificate was necessary before any payment could be claimed. All installments were paid except the last, for which this suit was brought. The

defense was that the contract was not performed as agreed and that the architect's certificate had not been obtained. The referee found that Nolan substantially and in good faith complied with the contract, but that there were trivial defects for which a deduction of \$200.00 should be made. Whitney appeals.

Point Involved: Whether a party under contract to construct a building according to plans and specifications involving minute details, can recover on the contract at the contract price, with a deduction for error, when he has not performed literally, but has performed substantially and in good faith.

EARL, J. "It is a general rule of law that a party must perform his contract before he can claim the consideration due him upon performance; but the performance need not in all cases be literal and exact. It is sufficient if the party bound to perform, acting in good faith, and intending and attempting to perform his contract, does so substantially, and then he may recover for his work, notwithstanding slight or trivial defects in performance, for which compensation may be made by an allowance to the other party. Whether a contract has been substantially performed is a question of fact depending upon all the circumstances of the case to be determined by the trial court. * * * According to the authorities cited, under an allegation of substantial performance, upon the facts found by the referee, Nolan was entitled to recover unless he is barred because he failed to get the architect's certificate, which the referee found was unreasonably and improperly refused. But when he had substantially performed his contract, the architect was bound to give him the certificate, and his refusal to give it was unreasonable, and it is held that an unreasonable refusal on the part of the architect in such a case to give the certificate dispenses with the necessity."

Question 139: What is the doctrine of the above case?

(Note: The doctrine that substantial performance made in good faith is sufficient to give one a right to aver a sufficient performance for purposes of recovery on the express contract, less a sum sufficient to correct the error, has usually been applied in construction contracts or contracts of great detail, where the other gets a benefit consisting in substantially what he bargained for, and which cannot be taken back by the other party because of the nature of the work done. This doctrine is supported in almost all, if not all, the states, and has been applied to all sorts of contracts by some of the cases. The effect of holding that the builder could not recover on the contract would be, either to deny him any remedy whatever, or to ignore his express contract, on the ground he had not performed it, and give him a remedy as on an implied contract, thus depriving him of the advantage of his express contract. Under this rule if his contract calls for \$15,000, he can sue for such sum from which the damages caused by the immaterial departure will be deducted, as, say \$50. Under any other rule he could not sue at all, or would have to sue as on an implied contract, without any benefit from his express contract.)

Sec. 109. Acceptance of Defective Performance as Full Performance.

Case No. 140. Smith v. Aiker, 102 N. Y. 87.

Facts: Suit brought to recover for balance due on a building contract. This contract provided for the production by the contractor of the architect's certificate before the owner was obliged to accept the building or pay the balance due. No such certificate was produced. The evidence showed, however, and the jury found that the owner accepted the work.

Point Involved: Whether a provision in the contract for the benefit of the party sued, could be set up as a defense by him, where the evidence discloses that he freely accepts the performance without insisting on such benefit.

DANFORTH, J.: “* * * It was contended on the trial * * * that a recovery could not be had without the production of the architect's certificate. * * *

(The Court below) held, and so instructed the jury, that the defendant could waive the stipulations he had introduced into the contract for his own benefit and that if he had accepted the house as under a complete contract, the plaintiff would be entitled to recover, although no certificate had been given, and even if the architect was not satisfied. That was the principal question presented; it was, we think, rightly decided. * * *

“Judgment for plaintiff affirmed.”

Question 140: What does the above case decide?

(Note: See Cases on Sales for a development of the subject of acceptance as waiver of breach. It is there brought out that one who accepts who has an opportunity to reject, may thereby forego his right to afterwards reject and yet may still save his right to have damages for the breach. But the acceptance may also show a waiver of damages. Circumstances govern.)

Case No. 141. Elliott v. Caldwell, 43 Minn. 357.

Facts: E. and others agreed to build for C. a dwelling house. C. resists payment according to the contract because the house as built was materially different from the one called for by the plans. The evidence was taken before a referee, who found that E. and the others materially deviated from the contract in numerous particulars both in work and materials.

Point Involved: Whether a retention of a benefit which one has no option to restore, can be considered as acceptance.

MITCHELL, J.: “* * * They are not mere slight defects or omissions, which may be remedied without difficulty so as to give defendants substantially the building they bargained for, but they are of a substantial nature, which run through the whole work, and are now incapable of correction and render the house substantially different from and inferior to the one which plaintiffs contracted to build. * * * Neither were they the re-

sult of mistake or oversight, but intentional and even fraudulent. * * *

“* * * In the case of a building on land under a contract which the builder fails to complete, or which he completes in a manner not conforming to the contract * * * the mere fact of the building remaining on the land, and that the owner resumed possession and enjoys the fruits of the labor, is not such an acceptance as alone will imply a promise to pay for it; for the possession of the land necessarily involves possession of the buildings in their existing state, and the owner has no option in rejecting them.”

Question 141: What are the facts, the question presented and the Court's decision in the above case?

(Note: For right to recover in such a case as on an implied contract see Sec. 121.)

Sec. 110. Performance of Contracts by Their Terms to Be Performed to the Others' Satisfaction.

Case No. 142. Brown v. Foster, 113 Mass. 136.

Facts: Suit to recover the price of a suit of clothes which the tailor agreed to make up to the customer's satisfaction. Defense, that he was not satisfied.

Point Involved: Whether one who has contracted that another shall make him a suit of clothes “to his satisfaction” may reject the clothes with no other reason than that he is not satisfied.

DEVENS, J.: “There was evidence at the trial to show that the contract between the parties was an express contract and by the terms of it the plaintiff agreed to make and deliver to the defendant, upon a certain day a suit of clothes which were to be made to the satisfaction of the defendant. The clothes were made and delivered upon the day specified, but were not to the satisfaction of the defendant, who declined to accept, and promptly returned

the same. If the plaintiff saw fit to do work upon articles for the defendant and to furnish materials therefor, contracting that the articles when manufactured should be satisfactory to the defendant, he can recover only upon the contract as it was made; and even if the articles furnished by him were such that the other party ought to have been satisfied with them, it was yet within the power of the opposite party to reject them as unsatisfactory. It is not for any one else to decide whether a refusal to accept is or is not reasonable, when the contract permits the defendant to decide himself whether the articles furnished are to his satisfaction. Although the compensation of the plaintiff for valuable services and materials may thus be dependent upon the caprice of another, who unreasonably refuses to accept the articles manufactured, yet he cannot be relieved from the contract into which he has voluntarily entered. * * *

Question 142: (1.) State the facts, the question presented and the Court's decision in the above case?

(2.) Suppose the customer had accepted the clothes, protesting that he was not satisfied, could he have made this defense?

Case No. 143. Duplex Safety Boiler Co. v. Garden, 101 N. Y. 387.

Facts: Contract to alter boilers for G., payment to be made only when G. was "satisfied that the boilers as changed were a success." The work was done in a workmanlike manner; but defendant, G., claimed he was not *satisfied*.

Point Involved: Whether one who has contracted that another shall do work of a mechanical character to his satisfaction, can aver in full defense for not accepting the work simply that he is not satisfied.

DANFORTH, J.: "* * * In the case before us the work required was specified, and was completed; * * *

If there was full performance on the plaintiff's part, nothing more could be required, and the time for payment had arrived; for * * * 'that which the law will say a contracting party ought in reason to be satisfied with, that the law will say he is satisfied with.'

"Another rule has prevailed where the object of the contract was to gratify taste, serve personal convenience, or satisfy individual preference. * * * A different case is before us."

Question 143: (1.) In what respect does this case differ from the one above? Are they opposed in principle?

(2.) Apply the principles of the above cases to the following contracts to be performed to the other's satisfaction:

- (a) Laying a roof: (McNeil & Armstrong, 81 Fed. 943).
- (b) Painting a portrait: (Pennington v. Howland, 21 R. I. 65).
- (c) Making a statue: (Zaleski v. Clarke, 44 Conn. 218).
- (d) Grading a dock: (Keeler v. Clifford, 165 Ill. 544).

(Note: These cases must not be confused with cases in which articles are sent for trial to be accepted if satisfactory or if the recipient desires to keep them. In such a case, of course, there is an absolute right of rejection.)

Case No. 144. Kendall v. West, 196 Ill. 223.

Facts: This was a suit brought by Ezra Kendall to recover \$10,000 for breach of a contract of employment, whereby West engaged Kendall to perform for West at such places and theatres in the United States and Canada as appellee might require, for the seasons of 1898, and 1899, Kendall to "render satisfactory services." The defendant was not satisfied with Kendall's services and requested Kendall to shorten his performance and try his part in black face. Kendall refused and West discharged him. He brought suit.

Point Involved: Whether under a contract for personal services, so long as such services are satisfactory, the employer is the sole judge as to the satisfactoriness of such services.

MR. JUSTICE HAND: “* * * The contract of employment provided that appellant should render ‘satisfactory services,’ for which he was to receive the sum of \$250 per week. It contained no provision in any manner limiting the appellee in the exercise of his judgment as to what should be deemed ‘satisfactory services.’ The appellant did not undertake to render services which should satisfy a court or jury, but undertook to satisfy the taste, fancy, interest and judgment of appellee. It was the appellee who was to be satisfied, and if dissatisfied he had the right to discharge the appellant at any time for any reason, of which he was the sole judge. (*Goodrich v. Van Nortwick*, 43 Ill. 445; *Crawford v. Mail and Express Publishing Co.* 57 N. E. Rep. 616.) In the *Goodrich* case the plaintiff purchased and paid for a fanning mill, with the agreement that if it did not suit him and answer his purpose he might return it within thirty days. It was held that the mill must answer both requirements, and if it did not suit the purchaser he had the right to return it and recover back the purchase price, and that he was the sole judge of whether or not he was suited. In the *Crawford* case the plaintiff made a contract to write for the defendant’s newspaper for two years, provided his services should be satisfactory to the publisher and it was held that the defendant had the right to discharge the plaintiff at any time if his services were unsatisfactory, of which fact the defendant was the sole judge.”

Question 144: State the facts, the question presented and the Court’s decision in the above case.

Sec. 111. Breach by Renunciation Prior to Performance.

Case No. 145. *Hochster v. De La Tour*, 2 El. & Bl. 678.

Facts: Plaintiff, in April, 1852, agreed to serve defendant, as courier, for three months from June 1, 1852, on certain terms. May 11, 1852, defendant wrote plaintiff he had changed his mind and would not employ plaintiff. May 22nd plaintiff brought suit. Defendant

claimed that there could be no breach until time of performance, and that until that time, he should have opportunity to change his mind.

Point Involved: Whether an executory contract can be treated by the promisee as broken by the promisor before the time for performance.

LORD CAMPBELL, C. J.: “* * * But it is surely much more rational and more to the benefit of both parties that after the renunciation of the agreement by the defendant the plaintiff should be at liberty to consider himself absolved from any future performance of it, retaining his right to sue for any damage he has suffered from the breach of it. Thus, instead of laying out money in preparations which must be useless he is at liberty to seek service under another employer, which would go in mitigation of the damages to which he would otherwise be entitled for a breach of the contract. It seems strange that the defendant, after renouncing the contract and absolutely declaring that he will never act on it, should be permitted to object that faith is given to his assertion, and that an opportunity is not left to him of changing his mind. * * *”

Question 145: What is the rule of law announced in this case?

Case No. 146. Kadish v. Young, 108 Ill. 170.

Facts: On December 15, 1880, Y. agreed to sell to K. 100,000 bushels of No. 2 barley at \$1.20 per bushel, to be delivered in January, 1881. On December 16, 1880, K. gave notice that he would not receive the barley. Y. nevertheless treated the contract as still subsisting and on January 12, 1881, tendered the warehouse receipts to K., who refused to accept. Thereupon Y. sold the barley on the market, at less than \$1.20 per bushel, and sued K. for the loss. K. contends that Y. should have acted on his renunciation and attempted to sell the barley in De-

cember, when barley was higher, and thus have diminished the damages in whole or part.

Point Involved: The same question as above. With the additional point whether the other party *must* act upon the attempted renunciation or may hold the contract open; and the consequences of so doing.

MR. JUSTICE SCHOLFIELD: "But the well settled doctrine of the English Courts is, that a buyer cannot thus create a breach of contract upon which the seller is bound to act. * * *

"The question came before this Court in *Fox v. Kitton*, 19 Ill. 519, whether, where a party agrees to do an act at a future time, and before the day arrives he declares he will not keep his contract, the other party may act on such declaration and bring an action before the day arrives; and it was held * * * that he may. * * * (Quoting from an English case) 'The notice (that he will not receive the wheat) amounts to nothing until the time when the buyer ought to receive the goods, *unless the seller acts on it in the meantime, and rescinds the contract.*' * * * 'He keeps the contract alive for the benefit of the other party as well as his own, * * * and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstances, which would justify him in declining to complete it.'

"* * * If appellees (Y.) had then the barley on hand and had acted on appellant's notice, *and accepted and treated the contract as then broken*, it would, doubtless, *then* have been their duty to have resold the barley upon the market, precisely as they did in January, and have given the appellants credit for the proceeds of the sale. * * *,"

Question 146: What does the Court decide in this case with reference to the necessity of acting upon an anticipatory breach, and the consequences ensuing upon either a failure to so act, or such action?

(Note: This right to accept or reject a prior renunciation gives no right to the party not in default to go on and *perform*. It simply gives a right to keep the contract open till time of performance.)

Sec. 112. Dependence and Independence of Conditions and Covenants as Affecting Performance and Breach.

Case No. 147. Kingston v. Preston, as cited in argument in 2 Doug. 689.

“It was an action of debt, for non-performance of covenants contained in certain articles of agreement between the plaintiff and the defendant. The declaration stated: That, by articles made the 24th of March, 1770, the plaintiff, for the considerations thereafter mentioned, covenanted, with the defendant, to serve him for one year and a quarter next ensuing, as a covenant-servant, in his trade of a silk-mercier, at £200 a year, and in consideration of the premises, the defendant covenanted, that at the end of the year and a quarter, he would give up his business of a mercier to the plaintiff, and a nephew of the defendant, or some other person to be nominated by the defendant, and give up to them his stock in trade, at a fair valuation; and that, between the young traders, deeds of partnership should be executed for 14 years, and, from and immediately after the execution of the said deeds, the defendant would permit the said young traders to carry on the said business in the defendant’s house. Then the declaration stated a covenant by the plaintiff, that he would accept the business and stock in trade, at a fair valuation, with the defendant’s nephew, or such other person, etc., and execute such deeds of partnership, and, further, that the plaintiff should, and would, at, and before, the sealing and delivery of the deeds, cause and procure good and sufficient security to be given to the defendant, to be approved of by the defendant, for the payment of £250 monthly, to the defendant, in lieu of a moiety of the monthly produce of the stock in trade, until the value of the stock should be reduced to £4000. Then

the plaintiff averred, that he had performed, and been ready to perform, his covenants, and assigned for breach on the part of the defendant, that he had refused to surrender and give up his business, at the end of the said year and a quarter. The defendant pleaded, 1. That the plaintiff did not offer sufficient security; and 2. That he did not give sufficient security for the payment of the £250, etc. And the plaintiff demurred generally to both pleas. On the part of the plaintiff, the case was argued by Mr. Butler, who contended, that the covenants were mutual and independent, and, therefore, a plea of the breach of one of the covenants to be performed by the plaintiff was no bar to an action for a breach by the defendant of one of which he had bound himself to perform, but that the defendant might have his remedy for the breach of the plaintiff, in a separate action. On the other side, Mr. Grose insisted, that the covenants were dependent in their nature, and, therefore, performance must be alleged: The security to be given for the money, was manifestly the chief object of the transaction, and it would be highly unreasonable to construe the agreement, so as to oblige the defendant to give up a beneficial business, and valuable stock in trade, and trust to the plaintiff's personal security (who might and, indeed, was admitted to be worth nothing), for the performance of his part. In delivering the judgment of the court, Lord Mansfield expressed himself to the following effect: There are three kinds of covenants: 1. Such as are called mutual and independent, where either party may recover damages from the other, for the injury he may have received by a breach of the covenants in his favor, and where it is no excuse for the defendant, to allege a breach of the covenants on the part of the plaintiff. 2. There are covenants which are conditions and dependent, in which the performance of one depends on the prior performance of another, and, therefore, till this prior condition is performed, the other party is not liable to an action on his covenant. 3. There is also a third sort of covenants, which are mutual conditions to be performed

at the same time; and, in these, if one party was ready, and offered, to perform his part, and the other neglected, or refused, to perform his, he who was ready, and offered, has fulfilled his engagement, and may maintain an action for the default of the other; though it is not certain that either is obliged to do the first act. His Lordship then proceed to say, that the dependence, or independence, of covenants, was to be collected from the evident sense and meaning of the parties, and, that, however transposed they might be in the deed, their precedency must depend on the order of time in which the intent of the transaction requires their performance. That, in the case before the court, it would be the greatest injustice if the plaintiff should prevail: The essence of the agreement was, that the defendant should not trust to the personal security of the plaintiff, but, before he delivered up his stock and business, should have good security for the payment of the money. The giving such security, therefore, must necessarily be a condition precedent. Judgment was accordingly given for the defendant, because the part to be performed by the plaintiff was clearly a condition precedent."

Question 147: What three sorts of covenants are there as described by the above case? What was the covenant and its nature in the above case?

Sec. 113. Impossibility of Performance as Discharge.

Case No. 148. Walker v. Tucker, 70 Ill. 526.

Facts: Contract to work a certain coal mine during the continuance of a lease, in a good and workmanlike manner. Breach alleged and suit brought thereon. Plea by the defendant to the effect that the working of the mine had become a hardship and unprofitable.

Point Involved: Whether hardship and burden caused by performing a contract is an excuse for its non-performance? What constitutes impossibility?

MR. JUSTICE SCHOLFIELD: “* * * The plea alleges that ‘on the said 15th day of September, 1871, the mines became and were wholly exhausted and incapable of yielding, when worked in a good and workmanlike manner, and with reasonable skill, care, diligence and energy, sufficient coal for working said mines,’ etc. *If the plea had stopped short, after alleging that the mines became and were wholly exhausted,* it would have been good, but the subsequent qualification shows that these words do not mean exhausted of coal, but only exhausted of such coal as was capable of yielding, ‘when worked in a good and workmanlike manner, and with reasonable skill, care, diligence, and energy, sufficient coal for working said mines.’ This might be, and yet the most valuable portion of the mine remain untouched. * * * Courts must enforce contracts as the parties make them. * * * There is nothing in this instrument which authorizes a suspension or abandonment of mining because it has become unprofitable. * * *

Question 148: What was the defense to this suit? Did it prevail? What defense did the Court say would have prevailed?

Case No. 149. Yerrington v. Green, 7 R. I. 589.

Facts: Contract to employ plaintiff as clerk and agent of business in New York and Philadelphia for a certain period. Death of the employer. Suit by the employee against the administrators of the employer.

Point Involved: Whether the death of the employer discharges the contract of employment.

BY COURT, AMES, C. J.: It is in general true that death does not absolve a man from his contracts; but that they must be performed by his personal representatives, or their non-performance compensated out of his estate. An exception to this rule, equally well established at both the civil and common law is, that in contracts in which performance depends upon the continued existence of a

certain person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance. The implication arises in spite of the unqualified character of the promissory words, because, from the nature of the contract, it is apparent that the parties contracted upon the basis of the continued existence of the particular person or chattel. The books afford many illustrations of this reasonable mode of construing contracts, *de certo corpore*, as the civil law designation of them is, in furtherance of the presumed and probable intent of the parties. The most obvious cases are the death of a party to a contract of marriage before the time fixed by it for the marriage; the death of an author or artist before the time contracted for the finishing and delivery of the book, picture, statue, or other work of art; the death of a certain slave promised to be delivered, or of a horse promised to be redelivered, before the day set for delivery or redelivery; and the death of a master or apprentice before the expiration of the term of service limited in the indentures. The bodily disability from supervening illness, as of an artist, from blindness, to paint the picture contracted for, or of a scholar to receive the instruction his father had stipulated should be received and paid for, has been held, for the like reason, to excuse each from the performance of his contract: *Hall v. Wright*, 1 El. B. & E.; *Stewart v. Loring*, 5 Allen, 306. The cases in support of these, and other illustrations of the exception to the general rule, are set down in the defendant's brief, and it is unnecessary to repeat them. Both at the civil and the common law, it is necessary that the party who would avail himself of this excuse for non-performance of the contract should be without fault in the matter upon which he relies as an excuse. The latest and most instructive case upon this subject, so far as the discussion of the principle of decision is concerned, is that of *Taylor v. Caldwell*, decided by the queen's bench in May last, 8 L. T., N. S., 356. In that case it was held that the parties were discharged

from a contract to let a music hall for four specified days for a series of concerts, by the accidental destruction of the hall by fire before the first day arrived. The full and lucid exposition by Mr. Justice Blackburn, who delivered the opinion of the court, of the prior cases, and of the principle upon which they had been decided, leaves nothing further to be desired upon this subject.

Does the case at bar fall within the general rule or within the exception we have been considering? This must depend upon the nature of the contract—whether one requiring the continuing existence of the employer, Keach, for performance on his part, or one which could, according to its spirit and meaning, be performed by the defendants, his administrators. The contract was to employ the plaintiff as clerk and agent of the intestate in his business in New York and Philadelphia; and it seems to us undoubted that the continued existence of both parties to the contract proceeded, and if called to their attention at the time of contract, must have been contemplated as such by them. The death of the plaintiff within the three years would certainly have been a legal excuse from the further performance of his contract; since it was an employment of confidence and skill, the duties of which, in the spirit of the contract, could be fulfilled by him alone. If this be the law in application to a covenant for ordinary service (*Shep. Touch.* 180), how much more in application to a contract for service of such confidence and skill as that of a clerk and agent for sale. On the other hand, this employment could continue no longer than the business in which the employer was engaged and the plaintiff retained. The intestate, when living, could by the contract have required the services of the plaintiff in no other business than that in which he had engaged him, and with no other person than himself. It would seem, then, necessarily to follow, that when the death of the employer put a stop to this business, and left no legal right over it in the administrators, except to close it up with the least loss to the estate of their decedent, they

were, by the contract, bound no longer to employ the plaintiff, any more than he to serve them. The act of God had taken away the master and principal—the law had revoked his agency, and stopped the business to which alone his contract bound him; and if he would serve the administrators in winding up the estate, it must be under a new contract with them, and under renewed powers granted by them. Any other result than that this contract of service was upon the implied condition that the employer, as well as the employed, was to continue to live during the stipulated term of employment, would involve us in the strange conclusion that the administrators might go on with the business of their intestate, in which the plaintiff must continue with powers unrevoked by the death of his principal, or that he, with new powers from them, was bound by the contract to serve them as new masters, and in a different service, and that they were bound to grant him such powers, and employ him for the stipulated time in such service. The novelty of such a claim, and the contradiction of well-settled principles necessary to maintain it, justify the ruling of the judge who tried the cause; and this motion must be dismissed with costs, and judgment entered upon the verdict.

Question 149: What was the contract in question, and why did the death of one party thereto discharge the obligation to perform? Generally speaking, what contracts are discharged by death?

Case No. 150. Booth v. Spuyten Duyvil Rolling Mill Co., 60 New York, 487.

Facts: Plaintiffs, having contracted to sell and deliver to N. Y. C. R. R. Co. 400 tons of rails with steel caps, contracted with defendant December 27, 1867, to furnish the caps, to be delivered April 1, 1868. On March 10, 1868, the defendant's mill burned and he was unable to furnish the caps. Plaintiff sues for breach and defendant claims impossibility of performance.

Point Involved: Whether the destruction of shop, machinery or tools in or by which a contracting party expects to execute his contract, which are not specified by the contract as necessary for its performance, excuses performance.

CHURCH, C. J. “* * * But the case is not within the principle decided in *Dexter v. Norton* (47 N. Y. 62), and the authorities upon which it was based. That principle applies when it is apparent that the parties contemplated the continued existence of a particular person or thing which is the subject of the contract, as in the case of a Musical Hall destroyed by fire (3 Best & S. 826); in the case of an apprentice who became permanently ill (4 C. P. 1 [L. R.]); and of a woman who, from illness, was unable to perform as a pianist (6 Ex. 269 [L. R.]). In these and analogous cases a condition is implied that the person or thing shall continue to exist. In *Dexter v. Norton* (*supra*), this principle was applied to relieve a party from damages for a failure to deliver property which was burned without his fault, but it has no application to a case of this character. There was no physical or natural impossibility inherent in the nature of the thing to be performed, upon which a condition that the mill should continue can be predicated. The article was to be manufactured and delivered and whether by that particular machinery or in that mill would not be deemed material.

* * *”

Question 150: (1.) State the facts, the question presented and the Court's decision in the above case.

(2.) A makes two contracts with B: (a) to sell B A's horse Dick; (b) to sell B 20 horses of a particular description. Before the time for the performance arrives a contagious disease breaks out among A's horses and kills the horse Dick and a herd of 40 horses out of which A expected to select the 20 other horses. A is unable to buy any horses corresponding to the description of the 20 horses. B sues A on both contracts. A pleads the facts as stated. Is he excused? (*Ontario Ass'n v. Packing Co.*, 134 Cal. 21.)

(Note: Mere hardship is never impossibility. [Walker v. Tucker, *supra*] ; nor impossibilities caused by climatic conditions that should have been foreseen and stipulated against, as the freezing of a river in midwinter. [Engster v. West, 35 La. Ann. 119.]

Impossibility is not a good defense, except where from the nature of the contract it must have been contemplated by both parties that the contract was to remain binding only in case performance were possible. Thus, strikes, inability to get laborers or building material, inability to accomplish results agreed upon because of incapacity, etc., are not causes of discharge, unless they are provided for in the contract.)

Case No. 151. Kelley v. Riley, 106 Mass. 339.

Facts: Suit for breach of promise of marriage. Defence that defendant was married when he made the promise. The plaintiff was innocent of the fact.

Point Involved: Whether impossibility known to one party but not known to the other discharges the contract.

COLT, C. J.: The defendant is not permitted to escape responsibility on the ground of his present legal inability to perform a promise of marriage to an innocent party. The damages to the plaintiff are certainly not diminished by the consideration that the promise was made under such circumstances. The strict rule that a consideration to support a promise is insufficient, if its performance is utterly and naturally impossible, is met by the suggestion that, even if the future performance here is to be treated as utterly impossible, yet the detriment or disadvantage which must necessarily result to the unmarried; and that is a sufficient consideration to bind the defendant."

Question 151: State the facts of this case and the rule announced by it.

CHAPTER SEVENTEEN

DISCHARGE BY AGREEMENT, NOVATION, ALTERATION AND OPERATION OF LAW

§ 114. Discharge by agreement.

§ 115. Discharge by novation.

§ 116. Discharge by alteration of
written agreement.

§ 117. Discharge by operation of
law.

Sec. 114. Discharge by Agreement.

(Note: A contract may be discharged by an agreement whereby both parties mutually agree to rescind it, whether or not they substitute a new agreement in its stead. By new agreement a contract may be completely abandoned or partially altered.)

A written contract may be altered by oral agreement. A contract under seal could not, at common law, be altered except by instrument under seal. This doctrine still prevails in some states. But everywhere, if such modification has been carried out, it will not be disturbed.)

Sec. 115. Novation.

(Note: By novation we indicate a change in an existing contract by which one term is substituted for another, or one party is substituted for another. Thus, we speak of novation of parties, and, novation of terms.)

Novation of parties indicates that one of the parties has been released of all liability and another substituted in his stead. Of course the consent of all the parties to the original contract and the contract of the new party is necessary. Thus, A has a contract with B. A, B and C by agreement substitute C in B's

stead, releasing B from all further obligation or connection with the contract.)

Sec. 116. Discharge by Alteration.

(Note: By alteration we indicate the purposeful change by one party without the consent of the other of a material part of a written agreement for the purpose of changing the effect thereof. The law is that such alteration discharges the other party of his obligation upon the writing.

Suppose, however, the party claiming to be so discharged has received money or other benefits under the contract. Can the writing be ignored and suit sustained as on an implied contract for a recovery of the benefits or their value? Some cases hold that such suit is maintainable; other cases hold otherwise. Alteration by a *third person*, acting without consent of the party, is known as spoliation. It cannot affect the rights of the parties upon the agreement. See further on this subject the Cases on Negotiable Paper. See also remarks of Lotz, J., on page 270, *post*.)

Sec. 117. Discharge by Operation of Law.

(Note: Death and bankruptcy operate as a matter of law to discharge certain contracts. Bankruptcy discharges certain debts, whether due or immature, but does not usually discharge executory contracts not in the nature of money debts.

Death discharges contracts whose performance it makes impossible, as we have seen under Impossibility of Performance.)

CHAPTER EIGHTEEN

REMEDIES UPON DISCHARGE

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| <p>§ 118. Remedy in damages occasioned by breach.</p> <p>§ 119. Decree for compelling specific performance.</p> <p>§ 120. Injunction against breach.</p> <p>§ 121. Right of party breaking con-</p> | <p>tract to recover implied value of benefits conferred.</p> <p>§ 122. Right to recover reasonable value of benefits conferred when contract discharged by impossibility of performance.</p> |
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Sec. 118. Remedy in Damages Occasioned by Breach.

Case No. 152. Hadley v. Baxendale, 9 Exch. R. 341.

Facts: Plaintiffs sued defendant as a common carrier for the breach of a contract to carry a crank shaft which was broken, and which the plaintiffs were sending to a certain person to be repaired. Breach alleged: unjustifiable delay in carrying the shaft; damages claimed: loss of profits for several days occasioned by not having the crankshaft. There was no evidence that defendant was informed or knew that loss of profits would follow its failure to carry the goods in proper time. The judge sent the case to the jury without instructing them whether or not or upon what basis they could allow the loss of profits, and the jury returned a verdict for £50, which is £25 more than defendant admits he is liable to pay. Defendant appeals.

Point Involved: The rule of damages to govern the assessment thereof upon breach of contract. Specifically, whether, in this case, the defendant under a contract to carry plaintiffs' goods was liable, on breach of that con-

tract, for loss of profits sustained by plaintiffs in not having such goods according to contract, defendant not being informed that loss of profits would follow.

ALDERSON, B.: “* * * Now we think the proper rule in such a case as the present is this: Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i. e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of a breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract. For, had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case; and of this advantage it would be very unjust to deprive them. Now the above principles are those by which we think the jury ought to be guided in estimating the damages arising out of any breach of contract. It is said, that other cases, such as breaches of contracts in the non-payment of money, or in the not making a good title to land, are to be treated as an exception from this, and as governed

by a conventional rule. But as, in such cases, both parties must be supposed to be cognizant of that well-known rule, these cases may, we think, be more properly classed under the rule above enunciated as to cases under known special circumstances, because there both parties may reasonably be presumed to contemplate the estimation of the amount of damages according to the conventional rule. Now, in the present case if we are to apply the principles laid down, we find that the only circumstances here communicated by the plaintiffs to the defendants at the time the contract was made, were, that the article to be carried was the broken shaft of a mill, and that the plaintiffs were the millers of that mill. But how do these circumstances show reasonably that the profits of the mill must be stopped by an unreasonable delay in the delivery of the broken shaft by the carrier to the third person? Suppose the plaintiffs had another shaft in their possession put up or putting up at the time, and that they only wished to send back the broken shaft to the engineer who made it; it is clear that this would be quite consistent with the above circumstances, and yet the unreasonable delay in the delivery would have no effect upon the intermediate profits of the mill. Or, again, suppose that, at the time of the delivery to the carrier, the machinery of the mill had been in other respects defective, then, also, the same results would follow. Here it is true that the shaft was actually sent back to serve as a model for a new one, and the want of a new one was the only cause of the stoppage of the mill, and that the loss of profits really arose from not sending down the new shaft in proper time, and that this arose from the delay in delivering the broken one to serve as a model. But it is obvious that, in a great multitude of cases of millers sending off broken shafts to third persons by a carrier under ordinary circumstances, such consequences would not, in all probability, have occurred; and these special circumstances were here never communicated by the plaintiffs to the defendants. It follows, therefore, that the loss of profits here cannot

reasonably be considered such a consequence of the breach of contract as could have been fairly and reasonably contemplated by both the parties when they made this contract. For such loss would neither have flowed naturally from the breach of this contract in the great multitude of such cases occurring under ordinary circumstances, nor where the special circumstances which, perhaps would have made it a reasonable and natural consequence of such breach of contract, communicated to or known by the defendants. The judge ought, therefore, to have told the jury that, upon the facts then before them, they ought not to take the loss of profits into consideration at all in estimating the damages. There must therefore be a new trial in this case."

Question 152: (1.) State the facts in this case. What circumstances should govern the jury in allowing or disallowing the loss of profits in this case?

(2.) From this case, how would you state the rule of the measurement of damages in contract cases?

Case No. 153. *Jordan v. Patterson*, 67 Conn. 473.

Facts: Plaintiffs ordered of defendants about 12,000 undergarments to be delivered at certain times, etc. Defendants accepted the order. They furnished only about 160 dozen. Plaintiffs claim damages for loss of profits.

Point Involved: The measure of damages in case of a breach by the seller of a contract to sell articles of merchandise.

ANDREWS, C. J.: " * * * The general intention of the law giving damages in an action for the breach of the contract like the one here in question is to put the injured party, so far as it can be done by money, in the same position that he would have been in if the contract had been performed. In carrying out this general intention, it must be remembered that the altered position

to be redressed must be one directly resulting from the breach. * * * In an action like the present one * * * the general rule is that the plaintiff is entitled to recover in damages the difference at the time and place of delivery between the price he had agreed to pay and the market price, if greater than the agreed price. * * * This, of course, implies that there is a market for such goods, where the plaintiff could have supplied himself. If there is no such market, then the plaintiff should have recovered the actual damages which he suffered. There may be, and often there are, special circumstances, other than the want of a market, surrounding a contract for the sale and purchase of goods, by reason of which, in case of a breach, the loss to a vendor for their non-delivery is increased. * * * It must be remembered also * * * that any damages which the plaintiff by reasonable diligence on his part might have avoided, are not to be regarded as the proximate result of defendant's acts. In the present case, the plaintiffs claimed that at the time of delivery there was no market in which they could procure such goods as the defendants were to deliver to them. This was a fact which might be proved by the testimony of any person who had knowledge on the subject. And if it was true, the plaintiffs could not by any diligence on their part have relieved themselves by such purchase from any portion of the damages which they suffered. * * *

"It is alleged in the complaint that by reason of the default of the defendants, the plaintiffs had been obliged to pay large damages to their vendees for their failure to deliver to them the goods so bargained to them, and they offered evidence to prove such a payment to one of their vendees. * * * In restoring an injured party to the same position he would have been * * * it is necessary to take into account losses suffered, as much as profits prevented. And whenever the loss suffered or the gain prevented results directly from a circumstance which may reasonably be considered to have been in the

contemplation of the parties when entering into the contract, the plaintiff should be allowed to prove such loss.

* * *

Question 153: (1.) What is the object of the law in allowing damages for breach of contract?

(2.) By what circumstances are the damages measured in the above case? (a) When the goods have market value? (b) When they have no market value?

(3.) Is the plaintiff bound to keep the damages down? How and to what extent?

Case No. 154. McKinley v. Goodman, 67 Ill. Ap. 374.

Facts: G. was a cook and caterer and was employed by M. to run a lunch counter at Bay City, Michigan. She claimed that her contract with M. was for a term from June 15 to September 1, 1894, and that after working one month she was wrongfully discharged.

Point Involved: The duty of an employee wrongfully discharged to reduce the damages by seeking employment elsewhere.

MR. PRESIDING JUSTICE BOGGS: “* * * The measure of damages of the plaintiff, if found entitled to recover, is the agreed or contract price during the unexpired period, less any sum the plaintiff has earned, or might have earned, by the exercise of reasonable effort to obtain other employment in the same line or general nature of business. * * *

“* * * Appellee was not required to hunt for employment in occupations different in their general nature and character from her avocation. * * *

Question 154: What is the duty of an employee wrongfully discharged to seek employment elsewhere?

Sec. 119. Decree for Specific Performance.

Case No. 155. P. & F. Corbin v. Tracy, 34 Conn. 325.

Facts: Bill in equity brought to compel the specific performance of a contract to assign a patent right.

Point Involved: Generally, when courts will decree the specific performance of a contract; specifically whether a contract to assign a patent right will be specifically enforced.

CARPENTER, J.: "Under the motion in error, it is objected that the petitioners have not made out a case for the interference of a court of equity; that courts of equity in this state will not interfere to enforce agreements to sell personal property unless the circumstances are such as to make a trust, because there is in such a case a remedy at law by an action for damages.

"The objection assumes that there is a distinction in questions of this character between real and personal property. If any such distinction exists it does not go to the extent claimed.

"The ground of the jurisdiction of a court of equity in this class of cases, is, that a court of law is inadequate to decree a specific performance and can relieve the injured party only by a compensation in damages, which in many cases would fall far short of the redress which the situation might require. Whenever, therefore, the party wants the thing *in specie* and he cannot otherwise be fully compensated courts of equity will grant him a specific performance. They will decree the specific performance of a contract for the sale of lands, not because of the peculiar nature of the land, but because a party cannot be adequately compensated in damages. So in respect to personal estate; the general rule that courts of equity will not entertain jurisdiction for a specific performance of agreements respecting goods, chattels, stocks, choses in action, and other things of a merely personal nature, is limited to cases where a compensation in damages furnishes a complete and satisfactory remedy. 2 Story's Eq. Jur. secs. 717, 718.

"The jurisdiction, therefore, of a court of equity does not proceed upon any distinction between real estate and

personal estate, but upon the ground that damages at law may not, in the particular case, afford a complete remedy. 1 Story's Eq. Jur. sec. 716, 717, 718, and cases there cited; *Clark v. Flint*, 22 Pick. 231. When the remedy at law is not full and complete, and when the effect of the breach cannot be known with any exactness, either because the effect will show itself only after a long time, or for any other reason, courts of equity will enforce contracts in relation to personalty. 3 Parson on Contracts. (5th Ed.) 373.

"An application of these principles to the case before us, relieves us of all difficulty. The contract relates to a patent right the value of which has not been tested by actual use. All the data by which its value can be estimated are yet future and contingent. * * * In any event its value cannot be known with any degree of exactness until after the lapse of time. * * * On the whole, we are satisfied that justice can only be done in a case like this by a specific performance of the contract."

Question 155: (1.) To what sort of remedy is a court of law (as distinguished from a court of equity) mainly confined. (2.) What is specific performance? (3.) On what grounds will it be granted? (4.) Will a decree for specific performance be granted in case of contracts to sell real estate? (5.) In case of contracts to sell personal property? (6.) In case of contracts to render personal services?

(2.) A contracts with B to sell B 100 bushels of wheat. Can A compel the specific performance of this contract? Why?

Sec. 120. Injunction Against Breach.

Case No. 156. Philadelphia Ball Club v. La Joie, 202 Pa. 210.

Facts: Bill brought to enjoin defendant from furnishing his services as a base ball player to rival base ball organizations. Facts appear in the opinion.

Point Involved: Whether a court will enjoin a party to a contract from breaking a covenant of a negative character contained therein.

POTTER, J.: "The defendant in this case contracted to serve the plaintiff as a baseball player for a stipulated time. During that period he was not to play for any other club. He violated his agreement * * *. The plaintiff by means of this bill, sought to restrain him during the period covered by the contract. * * *

"(The defendant) has been for several years in the service of the plaintiff club and has been re-engaged from season to season at a constantly increasing salary. He has become thoroughly familiar with the action and methods of other players in the club and his own work is peculiarly meritorious as an integral part of the team-work which is so essential. * * * La Joie is well known, and has great reputation among the patrons of the sport. * * * He may not be the sun in the baseball firmament, but he is certainly a bright particular star. We feel, therefore, that the evidence in this case justifies the conclusion that the services of the defendant are of such a unique character, and display such a special knowledge, skill and ability as renders them of peculiar value to the plaintiff, and so difficult of substitution that their loss will produce 'irreparable injury,' * * * The case, therefore, properly calls for the aid of equity in negatively enforcing the performance of the contract, by enjoining its breach. * * * The court cannot compel the defendant to play for the plaintiff, but it can restrain him from playing for another club in violation of his agreement. * * *

Question 156: (1.) What were the facts, the specific question presented and the Court's decision in the above case?

(2.) Could the Court decree specific performance of the contract to work for the Philadelphia ball club? Why?

(3.) Suppose the club had contracted for the services of a carpenter to keep the grounds in shape during the season, with a clause in the contract that he would work for no one else during that time, would the Court enjoin the breach of that covenant? Why?

(4.) A sells his business to B, and covenants he will not compete with A for a certain time and within a certain territory

(the reasonableness of which we may assume). He starts to open up a rival place of business contrary to the terms of his agreement. Will the Court issue an injunction?

Sec. 121. Right of Party Breaking Contract to Recover Implied Value of Benefits Conferred.

(Note: This section covers the cases in which there has been no waiver of breach by acceptance or otherwise, the benefits in these cases being under the circumstances not restorable, i. e., as services rendered before breach and of property built before breach on real estate.)

- (a) One view, no recovery. value of benefit.
- (b) The other view recovery for

(a) One View, No Recovery.

Case No. 157. *Cohn et al. v. Plumer*, 88 Wis. 622.

Facts: Suit to recover the reasonable value of marble put into a building, under a contract of construction not performed.

Point Involved: The right to recover as on an implied contract for benefits conferred and retained by the other party with no option to reject, under an express contract wilfully broken by the plaintiff.

WINSLOW, J.: "If there was a complete contract made by the plaintiffs, at the time of the meeting in the architect's office to furnish all the granite required for the building, according to the plans and specifications, for a specified sum, then the plaintiffs cannot recover on quantum meruit, because it is admitted they failed to perform such contract. * * *"

Question 157: State the facts and the rule of law of the above case.

Case No. 158. *Stark v. Parker*, 2 Pick. (Mass.) 267.

Facts: Suit for value of services rendered by plaintiff for defendant. Plaintiff was employed for one year

for the sum of \$120.00 for the year. He quit before the year was out, without cause and against defendant's consent.

Point Involved: The same as in the previous case, except that the benefits conferred are services rendered.

LINCOLN, J.: “* * * The direction to the jury was, ‘that although proved to them, that the plaintiff agreed to serve the defendant for an agreed price for one year, and had voluntarily left his service before the expiration of that time, and without the fault of the defendant, and against his consent, still the plaintiff would be entitled to recover of the defendant, in this action, a sum in proportion to the time he had served, deducting therefrom such sum (if any) as the jury might think the defendant had suffered by having his service deserted.’ If this direction was wrong, the judgment which was rendered must be reversed, and the case sent to a new trial, in which the diversity of construction given to the character and terms of the contract by the counsel for the respective parties may be a subject for distinct consideration.

“* * *

“The performance of a year's service was in this case a condition precedent to the obligation of payment. The plaintiff must perform the condition before he is entitled to recover anything under the contract, and he has no right to renounce his agreement and recover upon a quantum meruit. The cases of *McMillan v. Vanderlip*, 12 Johns R. 165; *Jennings v. Camp*, 13 Johns R. 94, and *Reab v. Moor*, 19 Johns R. 337, are analogous in their circumstances to the case at bar and are directly and strongly in point. The decisions in the English cases express the same doctrine, *Waddington v. Oliver*, 2 New Rep. 61; *Ellis v. Hamlen*, 3 Taunt. 52; and the principle is fully supported by all the elementary writers.”

Question 158: State the facts, the question presented and the Court's decision in the above case.

(b) The Other View, Recovery for Reasonable Value for Benefit.

Case No. 159. Britton v. Turner, 6 N. H. 481.

Facts: See the opinion.

Point Involved: The same as in the preceding case.

PARKER, J.: "It may be assumed that the labor performed by the plaintiff, and for which he seeks to recover a compensation in this action, was commenced under a special contract to labor for the defendant for the term of one year, for the sum of one hundred and twenty dollars, and that the plaintiff had labored but a portion of that time, and had voluntarily failed to complete the entire contract.

"It is clear, then, that he is not entitled to recover upon the contract itself, because the service, which was to entitle him to the sum agreed upon, has never been performed.

"But the question arises, can the plaintiff, under these circumstances, recover a reasonable sum for the service he has actually performed, under the count in quantum meruit.

"Upon this and questions of similar nature, the decisions to be found in the books are not easily reconciled.

"It has been held, upon contracts of this kind for labor to be performed at a specified price, that the party who voluntarily fails to fulfil the contract by performing the whole labor contracted for, is not entitled to recover anything for the labor actually performed, however much he may have done towards the performance, and this has been considered the settled rule of law upon this subject. 2 Pick 267, Stark v. Parker; 2 Mass. 147, Faxon v. Mansfield; 12 Johns. 165, McMillen v. Vanderlip; 13 Johns. 94, Jennings v. Camp; 19 Johns. 337, Reab v. Moor; 8 Cowen, 63, Lantry v. Parks; 9 Barn. & Cres. 92, Sinclair v. Bowles; 2 Stark. Rep. 256, Spain v. Arnott.

“That such a rule in its operation may be very unequal, not to say unjust, is apparent.

“A party who contracts to perform certain specified labor, and who breaks his contract in the first instance, without any attempt to perform it, can only be made liable to pay the damages which the other party has sustained by reason of such non performance, which in many cases may be trifling—whereas a party who in good faith has entered upon the performance of his contract, and nearly completed it, and then abandoned the further performance—although the other party has had the full benefit of all that has been done, and has perhaps sustained no actual damage—is in fact subjected to a loss of all which has been performed, in the nature of damages for the non-fulfilment of the remainder, upon the technical rule that the contract must be fully performed in order to a recovery of any part of the compensation.

“By the operation of this rule, then, the party who attempts performance may be placed in a much worse situation than he who wholly disregards his contract, and the other party may receive much more by the breach of the contract, than the injury which he has sustained by such breach, and more than he could be entitled to were he seeking to recover damages by an action.” (The court held that the plaintiff was entitled to recover the reasonable value of his services.)

Question 159: Give the Court’s reason for differing with the cases holding the opposite view.

Sec. 122. Right to Recover Reasonable Value of Benefits Conferred When Contract After Partial Execution Discharged by Impossibility of Performance.

Case No. 160. Fenton v. Clarke, 11 Vt. 557.

Facts: Plaintiff contracted to work for defendant for four months at \$10 per month, no money to be paid him until he had worked the entire period. He worked almost two months and quit on account of sickness. He brings suit to recover for the value of his services.

Point Involved: Whether if one who has contracted to render personal services, becomes unable to perform, on account of sickness, he can recover for the services rendered in partial performance.

BENNETT, J.: “* * * In the case before the Court, the plaintiff contracted with the defendant to labor personally for him four months, at \$10 per month, and by the terms of the contract was to receive no pay till he had worked the four months. These services, being of a personal character, the contract could not be performed by another, and as the plaintiff was disabled to perform it himself, by reason of sickness, which was the act of God, upon the authority of the foregoing cases the contract was discharged. The inquiry then arises, what is the result? It appears to me apparent that the plaintiff must, at least, after the expiration of the four months, be permitted to recover, as upon a *quantum meruit, pro rata* for the services rendered. Common justice requires this, and I should be sorry to find that it was not tolerated by the principles of the common law. To hold, in a case like this, where the plaintiff has been discharged of his contract by the act of God, that there can be no apportionment, upon the technical ground that the contract is entire, and its performance a condition precedent, is to my mind, leaving the substance and adhering to the shadow. If the plaintiff be relieved from the contract, how can the defendant interpose it, as a reason why the plaintiff should not recover for the labor actually performed.

* * *

“It is argued by the defendant, that in this case it was the duty of the plaintiff after he had recovered from the sickness, to return to the defendant and complete his four months’ labor and that, as he did not do it, he is for this cause prevented from a recovery. It is undoubtedly true that when any special matter does not operate to *annul* the contract, but only as a temporary *suspension* of it, * * * it is the duty of the party to perform the contract, within a reasonable

time after the cause of its suspension shall have ceased to operate. But in the present case, the auditor finds, that the plaintiff was not restored to health until after the expiration of four months. His services were of a personal character and the time of performance material to the rights of the parties. The defendant could not be required to accept of the services, at another time, and the plaintiff was as much excused from their performance by reason of his sickness as he would have been in the case of death, and the contract being annulled, by the act of God, and not simply suspended for a time, there is no reason why the plaintiff should have proffered to work for the defendant after being restored to health. Such proffer the defendant might have rejected, and it could have no possible effect upon the rights of the parties upon what was already past. * * *

Question 160: What were the facts in the above case? What did the Court decide?

DIVISION B



PRINCIPAL AND AGENT

DIVISION B

PRINCIPAL AND AGENT

- Part V. The Nature and Formation of the Relation of Principal and Agent.
- Part VI. Mutual Rights and Duties of Principal and Agent.
- Part VII. The Rights and Obligations of Third Persons Growing Out of the Agency.
- Part VIII. Termination of the Relation of Principal and Agent.

PART V

THE NATURE AND FORMATION OF THE RELATION OF PRINCIPAL AND AGENT

(Note: Cases on the Legality of Agency omitted. See the Cases on Contracts.)

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| Chapter Nineteen. | Definitions and Distinctions. |
| Chapter Twenty. | Capacity to Act as Principal and Agent. |
| Chapter Twenty-one. | The Authority Conferred by Prior Act. |
| Chapter Twenty-two. | The Authority Conferred by Ratification. |

CHAPTER NINETEEN

DEFINITIONS AND DISTINCTIONS

- § 123. Definition of agent and servant. § 125. Kinds of agents.
- § 124. Definition of agent as distinguished from servant.

Sec. 123. Definition of Agent and Servant.

(Note: We may first approach the definition of the agent by making no distinction between agent or servant. Says Mechem [Agency, Sec. 2], “* * * the two relations are essentially similar. * * * the same person often assumes to the principal many of the characteristics of both servant and agent. * * * most of the principles which govern one relation apply equally to another.

Case No. 161. Echols v. State, 158 Ala. 48.

Facts: The facts are stated in the first paragraph of the opinion.

Point Involved: Generally, of the circumstances that constitute one an agent. Specifically whether a tailor who contracts with a customer to make him a suit of clothes is an agent (or servant) of such customer.

SIMPSON, J. “The appellant was convicted of the offense of embezzlement; the affidavit charging that he ‘being an agent, servant or clerk of affiant, embezzled or fraudulently converted to his own use money to about the amount of \$18. * * *’ The evidence for the state, in its strongest light against the defendant, is that the defendant, being a tailor, agreed to make a suit of clothes

for the prosecutor for a certain amount of money, part of which was to be paid in cash and the remainder to be paid in the future; that the prosecutor made the cash payment and demanded his suit of clothes; that defendant refused to deliver without the payment of more money and also refused to return his money.

“This Court said in discussing a former statute * * * that an agent is ‘one who undertakes to transact some business or to manage some affair for another, by the authority and on account of the latter and to render an account of it;’ also that ‘“agent” so employed in this section, imports a principal, and implies employment, service, delegated authority to do something in the name and stead of the principal.’ Pullam v. State, 78 Ala. 31, 34, 56 Am. Rep. 21. The relation of principal and agent did not exist between the prosecutor and the defendant, but the relation of seller and purchaser. The defendant did not undertake to do anything in the name and stead of the prosecutor. The money was not placed in his hands to be used or cared for, and accounted for to the prosecutor, but was paid to him in part settlement for a suit of clothes, and thereby became the money of the defendant to use as he pleased. Whatever other liability or penalty the defendant may have incurred, he could not be convicted of embezzlement on the facts of this case. * * *

Question 161: (1.) When the customer in this case paid the money to the tailor, to whom did it belong?

(2.) Why was the tailor not an agent or servant of the customer?

(3.) What do you understand to be the crime of embezzlement?

Case No. 162. Singer Mfg. Co. v. Rahn, 132 U. S. 518.

Facts: Suit brought by Rahn against Singer Mfg. Co. to recover damages arising out of a personal injury sustained by plaintiff alleged to arise from the negligence of the defendant's servant, one Corbett, who sold defendant's sewing machines, using the horse and wagon fur-

nished him for that purpose. Defendant claims that Corbett is not its servant or agent, and that it is therefore not liable for his torts in driving said wagon.

Point Involved: What facts determine whether one is an agent (or servant) or an independent contractor.

GRAY, J. "The general rules that must govern this case are undisputed, and the only controversy is as to their application to the contract between the defendant company and Corbett, the driver, by whose negligence the plaintiff was injured.

"A master is liable to third persons injured by negligent acts done by his servant in the course of his employment, although the master did not authorize or know of the servant's act or neglect, or even if he disapproved or forbade it. *Philadelphia & Reading Railroad v. Derby*, 14 How. (U. S.) 478, 486. And the relation of master and servant exists whenever the employer retains the right to direct the manner in which the business shall be done, as well as the result to be accomplished, or, in other words, 'not only what shall be done, but how it shall be done.' *Railroad Co. v. Hanning*, 15 Wall. (U. S.) 649, 656.

"The contract between the defendant and Corbett, upon the construction and effect of which this case turns, is entitled 'Canvasser's Salary and Commission Contract.' The compensation to be paid to Corbett by the company, for selling its machines, consisting of a 'selling commission' on the price of machines sold by him, and 'a collecting commission' on the sums collected of the purchasers, is uniformly and repeatedly spoken of as made for his 'services.' The company may discharge him by terminating the contract at any time, whereas he can terminate it only upon ten days' notice. The company is to furnish him with a wagon; and the horse and harness to be furnished by him are 'to be used exclusively in canvassing for the sale of said machines and the general prosecution of said business.'

"But what is more significant, Corbett 'agrees to give

his exclusive time and best energies to said business,' and is to forfeit all his commissions under the contract, if, while it is in force, he sells any machines other than those furnished to him by the company, and he 'further agrees to employ himself under the direction of the said Singer Manufacturing Company, and under such rules and instructions as it or its manager at Minneapolis shall prescribe.

"In short, Corbett, for the commissions to be paid him, agrees to give his whole time and services to the business of the company; and the company reserves to itself the right of prescribing and regulating not only what business he shall do, but the manner in which he shall do it; and, if it saw fit, might instruct him what route to take, or even at what speed to drive.

"The provision of the contract, that Corbett shall not use the name of the company in any manner whereby the public or any individual may be led to believe that it is responsible for his actions, does not and cannot affect its responsibility to third persons injured by his negligence in the course of his employment.

"The circuit court therefore rightly held that Corbett was the defendant's servant, for whose negligence in the course of his employment, the defendant was responsible to the plaintiff. * * *"

Question 162: (1.) State in detail what facts led the Court to determine that the salesman was an agent or servant.

(2.) A desiring to construct a house on his land procures B, a building contractor, to do the work which is to be completed to the satisfaction of A's architect. B contracts with various parties to do particular parts of the work. One of these is C, an employing painter, who is to do all the painting for a certain lump price. D, a painter, works for C. By his negligence he injures M. Is C, B, or A liable?

(Note: As an illustration of the distinction between an agent and an "independent contractor" and the contractual results that follow from the distinction, see Case 167 *post*.

For the responsibility of the principal for the torts of his agent, see Chapter 30.)

Sec. 124. Definition of Agent as Distinguished from Servant.

Case No. 163. Kingan & Co. v. Silvers, 13 Ind. App. 80.

Facts: Suit against W. F. Silvers and James Silvers upon a note made by the Silvers to order of Kingan & Co. The complaint set forth the note and alleged that it had been procured from defendants by plaintiffs' traveling salesman, one Nichols, an agent employed to sell goods, but having no authority to take notes or make settlements for plaintiffs. That said salesman being about to go to Lebanon, Indiana, to take orders for goods, was instructed to procure a promissory note from defendants for \$388.03 on account of an indebtedness to plaintiff; that he did procure such note and afterwards and without plaintiffs' knowledge he altered it by erasing "after maturity" and inserting "from date" so that the note was made by its terms to bear 8% from date instead of after maturity, that plaintiffs claim on the note in its original condition, repudiating Nichols' act in altering the note.

Defense (in form of demurrer) that the complaint shows that plaintiffs by their agent are guilty of a purposeful and material alteration of the note and therefore have no right thereupon.

Point Involved: The difference between an agent and a servant; what sort of duties make one an agent, and what, a servant; the power of the agent and the servant to represent the principal for contractual purposes with third persons.

Lotz, J. " * * The most effectual means of preserving the integrity of such instruments are the rule that a material alteration destroys the instrument so that no recovery can be had upon it either in its original or altered condition, and the rule that no recovery can be had upon the original consideration if the change be made for a fraudulent purpose. * * *

" * * The change in the note was not made by

the plaintiffs' order or direction, but it entrusted certain business to another as its agent, and such person made the alteration. If the alteration was made by the agent while in the transaction of the principal's business, and in the scope of his authority, then the act of the agent is the act of the principal,—“*qui facit per alium, facit per se.*”

“* * * If he was the plaintiffs' agent and the act was within the scope of his authority, then his act must be deemed the act of the plaintiffs, and the law is with the defendants. If his position was that of a mere stranger to the note then the law is with the plaintiffs.

“* * * At the time Nichols made the alteration of the note, was he the agent or servant of the plaintiff in respect to his duties pertaining to said note. * * * Nichols was the agent of the plaintiff * * * to procure the note. * * * Did his relation as agent cease when he obtained the note, or did it continue until the note was delivered to the plaintiff? * * * This leads to the inquiry who are agents and who are servant? In the primitive conditions of society the things which were the subjects of sale and trade were few in number. There was little occasion for any one to engage in commercial transactions, and when it did become necessary the business was generally transacted by the parties thereto in person. But the strong and powerful had many servants who were usually slaves. The servants performed menial and manual services for the master. As civilization advanced the things which are the subjects of commerce increased, and it became necessary to perform commercial transactions through the medium of other persons. The relation of principal and agent is but an outgrowth or expansion of the relation of master and servant. The same rules that apply to the one generally apply to the other. There is a marked similarity in the legal consequences flowing from the two relations. It is often difficult to distinguish the difference between an agent and a servant. Agents are often denominated servants and servants are often called agents. The word ‘servant’ in

its broadest meaning includes an agent. There is, however, in legal contemplation a difference between an agent and a servant. The Romans, to whom we are indebted for many of the principles of agency, in the early stages of their laws used the terms *mandatum* (to put into one's hands or confide to the discretion of another) and *negotium* (to transact business or to treat concerning purchases) in describing this relation. Story Agency, section 4. Agency, properly speaking, relates to commercial or business transactions, while service has reference to actions upon or concerning things. Service deals with matters of manual or mechanical execution. An agent is the more direct representative of the master and clothed with higher powers and broader discretion than a servant. Mechem Agency, sections 1 and 2.

"The terms 'agent' and 'servant' are so frequently used interchangeably in the adjudications that the reader is apt to conclude that they mean the same thing. We think, however, that the history of the law bearing on this subject, shows that there is a difference between them. Agency in its legal sense always imports commercial dealings between two parties by and through the medium of another. An agent negotiates or treats with third parties in commercial matters for another. When Nichols was engaged in treating with the defendants concerning the note he was an agent. When the note was delivered to him it was in law delivered to the plaintiff and he ceased to treat or deal with the defendants. All his duties concerning the note then related to the plaintiff. It was his duty to carry and deliver it to the plaintiff. In doing this he owed no duty to the defendants. He ceased to be an agent because he was not required to deal further with third parties. He was then a mere servant of the plaintiff charged with the duty of faithfully carrying and delivering the note to his master. When Nichols made the alteration in the note he was the servant and not the agent of the plaintiff. * * *

"Modern jurisprudence properly and justly limits the liability of the master to the acts of his servant done

within the scope of the employment. There is still substantial and just grounds for the principle that the master is liable for the wrongful acts of his servant. No liability arises against the master for the wrongful acts of his servant unless the servant has perpetrated an injury upon either the person or property of another. Nichols was the servant of the plaintiff when he made the alteration of the note. But did he inflict any injury upon the property of the defendant? Certainly not. The injury, if any, was inflicted by the servant upon the property of his own master, and not upon the property of the defendants. * * * The principle that the master is liable for the tortious acts of his servant committed in the line of the employment has no application to the facts of this case, for no injury was done to the defendant's property."

Question 163: (1.) What were the facts in this case, the question presented and the Court's decision?

(2.) What is the nature of the duties that make one an agent? a servant?

(3.) For what purpose was Nicholas, an agent, and for what a servant in this case?

Sec. 125. Kinds of Agents.

(Note: Agents may be divided into those who are general and special. A general agent is one who has an authority to transact all the business of a principal or all business of some particular kind, as to manage his granary. His authority is broad and general in its scope and carries with it the implied and apparent power to do all things incidental and necessary and such as are usual. A special agent is appointed to do some particular thing. Agents may be also classified as those who are not professional and those who are, the latter including, brokers, factors, auctioneers and attorneys at law.)

CHAPTER TWENTY

CAPACITY TO ACT AS PRINCIPAL OR AGENT

A. Capacity to act as principal. B. Capacity to act as agent.

A. Capacity to Act as Principal.

§ 126. In general.

§ 128. Insane persons.

§ 127. Minors.

§ 129. Corporations.

Sec. 126. In General.

Case No. 164. Greenwood v. Spring, 54 Barb. (N. Y.)
375.

JAMES, J.: “* * *

“A person who is of capacity sufficient to do an act
himself may do it by an attorney * * *.”

Question 164: State the above rule.

(Note: Generally speaking one may do by agent what he may do in his own person. This of course has some limitations. Public policy forbids some acts to be done other than in person, as to vote at public elections, to marry, etc. So duties done by one under contract may expressly or impliedly be forbidden to be done except in person. Most duties undertaken by agents can not be delegated to others as we will notice later.)

Sec. 127. Minors.

(See case 2, *supra*.)

Sec. 128. Insane Persons.

Case No. 165. Blinn v. Schwartz, 177 N. Y. 252.

Facts: Suit in ejectment brought by Blinn against Julia Schwartz to set aside a deed alleged to have been delivered and the proceeds thereof received under certain powers of attorney executed while plaintiff was insane, though he was never legally adjudged insane, and Julia Schwartz denies that she had knowledge of the insanity.

It is claimed that by facts, the statement of which we may here omit, Blinn, after recovering his sanity ratified what his agent may have done in his behalf. No offer to return the consideration held by Julia Schwartz has been made.

Point Involved: What is the legal effect of the attempted appointment of an agent by an insane person?

VANN, J.: "The deed in question and both powers of attorney were executed by the plaintiff when he was of unsound mind and incapable of attending to his affairs, as the jury might have found. * * *

"* * * The evidence warrants the conclusion that the plaintiff ratified the act of his agent as well as his own with reference to the deed under consideration, provided the deed and powers of attorney were not absolutely void but merely voidable. * * *

"Using the term in its exact sense and limiting it to the parties themselves, a void contract is binding upon neither and cannot be ratified. Even if ratified in form by both, it would be a new contract and would take effect only from the date of the attempt at ratification. A voidable contract on the other hand binds one party but not the other, who may ratify or rescind at pleasure.

* * *

(Here the Court cites numerous authorities.)

“We think the rule laid down by these cases is sound and in the interest of those afflicted with disease of mind. The deed of a lunatic is not void, in the sense of being a nullity, but has force and effect until the option to declare it void, is exercised. The right of election implies the right to ratify it and it may be greatly to the interest of the insane person to have that right. * * * Upon the record before us, therefore, even if the plaintiff was insane at the date of the deed, there was no error in directing a verdict for the defendants. * * *”

Question 165: State the power of the insane person to appoint an agent.

Sec. 129. Corporations.

(Note: A corporation can act only by agent. It may appoint agents to do those things which its charter by express provision or by fair implication gives it power to do. See the cases on corporations.)

B. Capacity to Act as Agent.

Sec. 7. The Rule Stated.

Case No. 166. Lyon & Co. v. Kent, 45 Ala. 656.

PETERS, J.: “* * * Any one, except a lunatic, imbecile, or child of tender years, may be an agent for another. It is said by an eminent author and jurist, that ‘it is by no means necessary for a person to be *sui juris*, or capable of acting in his or her own right, in order to qualify himself or herself to act for others. Thus, for example, monks, infants, *femes covert*, persons attainted, outlawed or excommunicated, villeins and aliens may be agents for others.’ Story’s Agency, 6, 7, 9. So, a slave, who is *homo non civilis*, a person who is but little above a mere brute in legal rights may act as the agent of his

owner or his hirer. *Powell v. The State*, 27 Ala. 51; *Stanley v. Nelson*, 28 Ala. 514."

Question 166: (1.) State in your own words the rule as to capacity to be agent.

(2.) State your explanation of the fact that it takes less legal capacity to be an agent than to be a principal.

CHAPTER TWENTY-ONE

THE AUTHORITY CONFERRED BY PRIOR ACT

§ 130. In general.

§ 131. The form of the appointment.

Sec. 130. In General.

Case No. 167. Central Trust Co. v. Bridges, 57 Fed. 753.

Facts: Proceedings to foreclose a mortgage on the railroad property. Certain creditors intervene to establish mechanic's liens under a section of a statute giving principal contractors a mechanic's lien. To come within this section of the statute the creditor must show that he contracted with the owner (or the owner's agent) and not with an *independent contractor*. One Eager in this case had contracts with the company for the construction of the work and it was with Eager that the intervening creditors dealt. They claim that Eager was an agent of the company, and not an independent contractor, and hence that they were direct contractors with the company through its agent. Eager did not, however, make any contracts in the name of the company, and the contracting parties dealt with him and made no inquiry into his real relationship with the company.

Point Involved: That one will not be deemed as the principal of another in the other's contracts with third persons, except upon facts showing, either that he had *actually* conferred authority upon the agent, or that he had *apparently* done so.

TAFT, J.: “* * * The theory upon which the master and the learned Court below held that all the intervening petitioners dealt directly with the Knoxville Southern Railroad Company as principal contractors was that Eager was an agent of the railroad company in making the contracts. One may be liable for the acts of another as his agent on one of two grounds: first, because by his conduct or statements he has held the other out as his agent; or, second, because he has actually conferred authority on the other to act as such. The master reported to the Court below that in no case did Eager, under or in the name of the Knoxville Southern Railroad Company, make any contract with any one doing work or furnishing material for the road; that the men who contracted with Eager knew very little of Eager, saw him only occasionally, made no inquiry into his real relation to the company, what interest he had in it, or how he obtained money to carry on the work. In substance, the master reported that the intervening petitioners believed they were dealing with Eager as principal contractor. The proof fully sustains this conclusion.

“It follows, necessarily, that Eager was not the agent of the company in contracting with the petitioners for the construction of the road unless the company had in fact conferred authority upon him to act as its agent in the matter. An agency is created—authority is actually conferred—very much as a contract is made, i. e., by an agreement between the principal and agent that such a relation shall exist. The minds of the parties must meet in establishing the agency. The principal must intend that the agent shall act for him, and the agent must intend to accept the authority and act on it, and the intention of the parties must find expression either in words or conduct between them. * * *

“* * * In the case at bar, the master fully admits there was no holding out of agency in Eager by the company. His finding that an agency in fact existed rests simply on the influence which Eager had over the company and not in the intention of either that Eager should

act as its agent in the construction of the road, and his conclusion is reached in the face of the fact which he fully admits, that they both intended Eager to be an independent contractor. The master's conclusion cannot be supported. * * *,"

Question 167: What would it have been necessary for the claimants to show in this case in order to establish that Eager could bind the company as its agent?

(Note: We will notice hereafter that the actual conferring of the authority may be done by previous appointment or by *ratification*. But in either case the authority of the agent must be in some way traced back to the principal's acts or statements.)

Sec. 131. The Form of Appointment.

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| (a) As required by the statute of
frauds. | (b) To execute instrument under
seal. |
|--|--|

(a) As Required by the Statute of Frauds.

(See the statute as set out as Case No. 84, Division 1, Contracts.)

(Note: The original statute of frauds required contracts for the sale of lands to be in writing. But the appointment of the agent to contract for the sale of such lands did not have to be in writing. Hence, if he was really appointed, although by oral appointment, and the contract made by him for the sale of the land was in writing, it was enforceable. (Johnson v. Lodge, 17 Ill. 433.) But, now, some states provide that the authority to sell real estate, must be conferred in writing. See Kozel v. Dearlove, 144 Ill. 23. See also Hawkins v. McGroarty, *post*.)

See also Case No. 98, *supra*.

(b) To Execute Contracts Under Seal.

Case No. 168. Hanford v. McNair, 9 Wend. (N. Y.) 54.

Facts: Suit on contract under seal executed by an agent who was not authorized under seal to make the contract.

SUTHERLAND, J.: "It is an insuperable objection to the plaintiff's recovery in this action, that no competent authority from the defendant to Bush is shown to execute the covenant on which the suit is found. An agent cannot bind his principal by deed [instrument under seal] unless he has authority by deed to do so. The only exception to the rule that the authority to execute a deed must be by deed, is where the agent or attorney fixes the seal of the principal in his presence and by his direction.

* * *

Question 168: What was the rule as announced in this case (being the common law rule as to the requisite character of an authority to execute an instrument under seal)?

(Note: This rule would not apply in states in which the character of an instrument under seal has been destroyed by legislation. Many modern cases also hold that where an agent is appointed by appointment not under seal to execute a contract not under seal, his addition of a seal may be treated as a superfluity and the contract regarded as an unsealed agreement.

An agent need not have authority in writing to execute a contract in writing, unless in some particular cases, the local statute requires it.)

CHAPTER TWENTY-TWO

THE AUTHORITY CONFERRED BY RATIFICATION

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| § 132. Ratification defined. | § 137. Ratification of part ratifies |
| § 133. Appearance of agency for existing principal necessary. | all. Retaining benefits as ratification. |
| § 134. What acts can be ratified. | § 138. Silence as ratification. |
| § 135. Formalities of ratification. | § 139. Suit as ratification. |
| § 136. Knowledge of facts by principal as essential to ratification. | § 140. The effect of ratification. |

Sec. 132. Ratification Defined.

(Note: Ratification may be defined as a conferring of authority upon the agent by the principal, after the agent, having neither actual nor apparent authority but purporting to have, and believed by the third party to have, has by an act in the principal's name, attempted to bind the principal. It makes the principal liable as though authority had been previously conferred. It applies: (1) where the agent had *no* authority, or (2) had authority to some extent but acted in excess thereof. See next sections for the essential elements in ratification and effect of ratification, and see next case [remarks of Lord MacNaghten] for a judicial definition.)

Sec. 133. Appearance of Agency from Existing Principal Necessary.

Case No. 169. Keighley, Maxstead & Co. v. Durant, L. R. 1901, A. C. 240.

Facts: Roberts, a corn merchant at Wakefield, having authority to buy grain for Keighley, Maxstead & Co. at a certain price, contracted in his own name and appar-

ently his own behalf to buy grain from Durant, a corn merchant in London, at a price for which he had no authority to buy grain for K., M. & Co. The next day K., M. & Co. agreed with Roberts to take this grain with him on joint account. Roberts and K., M. & Co. having failed to take delivery of the grain, were sued.

Point Involved: Whether if A makes in his own name and apparently in his own behalf, a contract with B, and C afterwards contracts with A to take the benefit of that contract, B can hold C as a party to the contract?

EARL OF HALSBURY, L. C.: "My Lords, there are here no facts really in dispute in this case. Roberts made a contract on his own behalf and without the authority of anybody else. The contract was made and the parties to it ascertained, and I am of opinion that upon no principle known to the law could the present appellants be made parties to that contract. They could, of course, make another contract in the same terms if they pleased, but it would not be this contract. It is suggested by the judgment of the Court of Appeal as possible that what is described as ratification might if the parties had so pleased, make the contract, which was one made between A and B, to include C, as one of the contracting parties. I think such a suggestion is contrary to all principle, and for it there is no decision which calls for your Lordships to override it.

* * * The parties to the contract who have already bound themselves by it, are just as much part of the contract as any other part of the contractual obligations entered into.

"I confess I do not see the relevancy of the argument that the contract might be made in the name of an unknown principal, and that such principal may sue and be sued, though the name was not given at the time the contract was made. The fact is that in such a case the contract is made by him, and the disclosure afterwards does not alter or affect the contract actually made. Here it would alter the contract afterward and make it a different contract. * * *

LORD MCNAGHTEN: "My Lords, I am of the same opinion.

"* * *

"As a general rule, only persons who are parties to a contract, acting either by themselves, or by an authorized agent, can sue or be sued on a contract. A stranger cannot enforce the contract, nor can it be enforced against a stranger. That is the rule; but there are exceptions. The most remarkable exception, I think, results from the doctrine of ratification as established in English law. That doctrine is thus stated by Tindall, C. J., in *Wilson v. Tumman* (1843, 6 M. & G., at p. 242): 'That an act done, for another, by a person not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal, if subsequently ratified by him, is the known and well established rule of law. In that case the principal is bound by the act, whether it be for his detriment or disadvantage, and whether it be founded on a tort or on a contract, to the same effect as by, and with all the consequences that follow from, the same act done by his *previous* authority.' And so by a wholesome and convenient fiction, a person ratifying the act of another, who without authority, has made a contract openly and avowedly on his behalf, is deemed to be, though in fact he was not a party to the contract. Does the fiction cover the case of a person who makes no avowal at all, but assumes to act for himself and no one else? If Tindall, C. J.'s statement of the law is accurate, it would seem to exclude the case of a person who may intend to act for another, but at the same time keeps his intention locked in his own breast.

"* * * But ought the doctrine of ratification to be extended to such a case? On principle I should say certainly not. * * *

Question 169: (1.) State the facts, the question presented and the Court's decision in the above case.

(2.) An undisclosed principal can be sued by the third person. Why was this not such a case?

(3.) What was Chief Justice Tindall's definition of ratification?

(4.) A, of the firm of A and B, bought goods in his own name and without B's knowledge, expecting to use such goods in another partnership to be formed with C. The firm of A and B did not dissolve as expected, and A and B afterwards used the goods so bought by A. Is B liable in a suit by A's vendor for the price of the goods? (13 Manitoba L. Rep. 147, 2 Brit. R. C. 254.)

Case No. 170. Watson v. Swann, 11 C. B. N. S. 756 at p. 771.

WILLES, J.: “* * * to entitle a person to sue upon a contract, it must clearly be shown that he himself made it, or that it was made on his behalf by an agent authorized to act for him at the time or whose act has been subsequently ratified and adopted by him. The law obviously requires that the person for whom the agent professes to act must be a person capable of being ascertained at the time. It is not necessary that he should be named; but there must be such a description of him as shall amount to a reasonable designation of the person intended to be bound by the contract. * * * The doctrine of ratification shall have reference to the time when the act was done which the supposed principal attempts to ratify. * * *”

Question 170: When one is held as principal, what condition is necessary as to his identification and existence at the time the contract was made?

(Note: It must not be understood that a principal cannot sue or be sued unless he was named or ascertainable when the agent made the contract, for *undisclosed* principals may sue or be sued, as hereafter shown. But in such cases there is no *ratification* involved. The principal, though undisclosed, had actually conferred authority.

Though a principal not in existence or not ascertainable at the time the agent acted, cannot ratify, yet he may *adopt* the act by taking the benefits thereof or otherwise. This principle of adoption has its greatest application in case of newly formed

corporations, which often become liable for the acts of promoters or other parties, done prior to the corporate existence. An adoption, as distinguished from a ratification, is a *new contract*.)

Sec. 134. What Acts Can Be Ratified.

Case No. 171. Zottman v. San Francisco, 20 California, 96.

Facts: The City of San Francisco was given power by its charter to make public improvements, but was required in making such improvements to publish the ordinance directing the same, and to let the work to the lowest bidder after advertising for bids in the public journals. Zottman and another entered into a contract with the city providing for the erection of an iron fence, this contract being pursuant to due procedure. Afterwards, a special committee of the council, authorized to accept this fence, decided that the fence ought to have a base of stone and to be painted and they directed Zottman to do the work, promising that the city would pay for it. All the members of the common council knew of the extra work and no one disapproved thereof. The city now refuses to pay for the work on the ground it was not properly authorized.

FIELD, C. J.: "As a necessary consequence flowing from these views, a contract not made in the prescribed mode cannot be affirmed and ratified in disregard of that mode by any subsequent action of the corporate authorities, and a liability be thereby fastened upon the corporation. Ratification is equivalent to a previous authority; it operates upon the contract in the same manner as though the authority to make the contract had existed originally. The power to ratify, therefore, necessarily supposes the power to make the contract in the first instance; and the power to ratify in a given mode supposes the power to contract in the same way. Therefore, where the charter of a city authorizes a sale of city property only at public auction, a sale not thus made is from its

very nature incapable of ratification, because it could not have been otherwise made originally. So where the charter authorizes a contract for work to be given only to the lowest bidder, after notice of the contemplated work in the public journals, a contract made in any other way—that is, given to any other person than such lowest bidder—cannot be subsequently affirmed. Were this not so, the corporate authorities would be able to do retroactively what they are prohibited from doing directly.”

Question 171: State the facts in this case, the question presented and the Court’s decision.

(Note: See for discussion this specific topic, Dillon on Municipal Corporations, 5th Ed., Sec. 797.)

Case No. 172. Henry v. Heeb, 114 Ind. 275.

Facts: Suit by Heeb against Henry and others on certain promissory notes, one of which the defendant Henry denies having made or authorized, but to which his name appears to have been placed as his signature. The Court instructed the jury that if they found from the evidence that Henry after having obtained full knowledge upon the subject of whether or not he executed the note, ratified and confirmed the same and promised to pay it, he would be liable for the amount thereof. The giving of this instruction is now complained of on appeal.

Point Involved: Can a forgery be ratified?

MITCHELL, C. J. “* * * The appellant contends that a person whose name has been forged to a note cannot ratify or adopt the criminal act, so as to become bound, unless facts have intervened which create an estoppel, and preclude him from setting up as a defense that his signature is not genuine. There appears to be an irreconcilable conflict in the decisions of the courts of last resort on this question. Thus in *Wellington v. Jackson*, 121 Mass. 157, the supreme judicial court of Massachusetts, following its earlier decisions, held that one whose signature had been forged to a promissory

note, who yet, with knowledge of all the circumstances, and intending to be bound by it, acknowledged the signature, and thus assumed the note as his own, was bound to the same extent as if the note had been signed by him originally, without regard to whether or not his acknowledgment amounted to an estoppel *in pais*: *Greenfield Bank v. Crafts*, 4 Allen, 447; *Bartlett v. Tucker*, 104 Mass. 336 (341); 6 Am. Rep. 240. To the same effect is *Hefner v. Vandolah*, 62 Ill. 483; 14 Am. Rep. 106; *Fitzpatrick v. School Commissioners*, 7 Humph. 224; 46 Am. Dec. 76.

“There are other cases which, while seeming to lend support to the doctrine that a forged signature may be ratified, nevertheless turn upon the proposition that the holder of the note had in some way acted in reliance upon the promise or admission of the person whose name appeared on the note, or that the latter had received or participated in the consideration for which the note had been given, and was therefore estopped to deny the genuineness of his signature. Still other decisions depend upon principles which distinguish them from cases involving the doctrine of ratification or adoption of forged instruments purely: *Casco Bank v. Keene*, 53 Me. 103; *Forsyth v. Day*, 46 Id. 176; *Corser v. Paul*, 41 N. H. 24; 77 Am. Dec. 753; *Woodruff v. Munroe*, 33 Md. 146; *Union Bank v. Middelbrook*, 33 Conn. 95; *Livings v. Wiler*, 32 Ill. 387; *Commercial Bank v. Warren*, 15 N. Y. 577; *Crout v. DeWolf*, 1 R. I. 393; *McKenzie v. British Linen Co.*, L. R. 6 App. Cas. 82; *Forsythe v. Banta*, 5 Bush, 548.

“It is a well-established rule of law that if one, not assuming to act for himself, does an act for or in the name of another upon the assumption of authority to act as the agent of the latter, even though without any precedent authority whatever, if the person in whose name the act was performed subsequently ratifies or adopts what has been so done, the ratification relates back and supplies original authority to do the act. In such a case the principal is bound to the same extent as if the act had been done in the first instance by his previous authority, and this is so whether the act be detrimental to the principal

or to his advantage, or whether it be founded in tort or contract. The reason is, that there was an open assumption to act as the agent of the party who subsequently adopted the act. The agency having been knowingly ratified, the ratification becomes equivalent to original authority: *Wilson v. Tumman*, 6 Man. & G. 236; *Smith v. Tramel*, 68 Iowa, 488. So, if a contract be voidable on account of fraud practiced on one party, or if for any reason it might be avoided, yet if the party having the right to avoid the contract, being fully informed, deliberately confirms or ratifies it, even though this be done without a new consideration, and after acts have been done which would have released the person affected, the party thus ratifying is thereby precluded from obtaining the relief he otherwise might have had: *Williams v. Boyd*, 75 Ind. 286.

“The ratification or adoption of a forged instrument, or of a contract which is prohibited by law, or made in violation of a criminal statute, involves altogether different principles. One who commits the crime of forgery by signing the name of another to a promissory note does not assume to act as the agent of the person whose name is forged. Upon principle, there would seem to be no room to apply the doctrine of ratification or adoption of the act in such a case. Where the act done constitutes a crime, and is committed without any pretense of authority, it is difficult to understand how one who is in a sense the victim of the criminal act may adopt or ratify it, so as to become bound by a contract to which he is to all intents and purposes a stranger, and which as to him was conceived in a crime and is totally without consideration. As has been well said, it is impossible in such a case to attribute any motive to the ratifying party but that of concealing the crime and suppressing the prosecution; ‘for why should a man pay money without consideration when he himself had been wronged, unless constrained by a desire to shield the guilty party?’

“The distinction made in many well-considered cases seems to be this: Where the act of signing constitutes the

crime of forgery, while the person whose name has been forged may be estopped by his admissions, upon which others may have changed their relations from pleading the truth of the matter to their detriment, the act from which the crime springs cannot, upon considerations of public policy, be ratified without a new consideration to support it: *Shisler v. Vandike*, 92 Pa. St. 447; 37 Am. Rep. 702; *McHugh v. County of Schuylkill*, 67 Pa. St. 391; *Workman v. Wright*, 33 Ohio St. 405; 31 Am. Rep. 546, and note; *Owsley v. Philips*, 78 Ky. 517; *Brooke v. Hook*, 24 L. T. 34; 2 *Daniel on Negotiable Instruments*, 1351, 1353; 2 *Randolph on Commercial Paper*, sec. 629.

“In a case of a known or conceded forgery, we are unable to discover any principle upon which a subsequent promise by the person whose name was forged can be held binding in the absence of an estoppel *in pais*, or without a new consideration for the promise: *Workman v. Wright*, *supra*; *Owsley v. Philips*, *supra*.

“* * *

Question 172: (1.) What is the difference in the character of an act constituting a forgery and the execution of an act in behalf of another without authority?

(2.) How does the Indiana Court indicate that one whose name has been forged, can render himself liable on the forged instrument?

(3.) What distinction is said to be taken in many cases?

(4.) Is this distinction taken in all courts?

(5.) In every state what result does not follow where there is an adoption or ratification of a forged instrument by the party whose name is forged?

Case No. 173. *Dempsey v. Chambers*, 154 Mass. 330.

Facts: Suit is to recover damages for the breaking of a plate glass window. The glass was broken by the negligence of one McCulloch, while delivering some coal which had been ordered of the defendant by the plaintiff. It was found by the trial court as a fact that McCulloch was not the defendant's servant when he delivered the coal and broke the window, but that the defendant after-

wards ratified the delivery of the coal. Judgment in the trial court for plaintiff. Defendant appeals.

Point Involved: Whether an unauthorized tort committed as a part of an act done on behalf and in the name of another, but not at the time authorized by another can be ratified and whether it is so by the ratification of the act of which it is a part.

HOLMES, J.: “* * *

“It is hard to explain why a master is liable to the extent that he is for the negligent acts of one who at the time really is his servant, acting within the general scope of his employment. Probably master and servant are ‘famed to be all one person,’ but a fiction which is an echo of the *patria potestas* and of the English frank-pledge. *Byington v. Simpson*, 134 Mass. 169, 170, 45 Am. Ref. 314; *Fitz. Abr.*, tit. Corone, fil. 428. Possibly the doctrine of ratification is another aspect of the same tradition. The requirement that the act should be done in the name of the ratifying party, looks that way: * * *

“Doubts have been expressed, which we need not consider, whether this doctrine applied to a case of a bare personal tort: *Adams v. Freeman*, 9 Johns. 117, 118; *Anderson and Warburton, JJ.*, in *Bishop v. Montague*, Cro. Eliz. 824. If a man assaulted another in a street out of his own head, it would seem rather strong to say that if he merely called himself my servant, and I afterwards assented, without more, our mere words would make me a party to the assault, * * * Perhaps the application of the doctrine would be avoided on the ground that the facts did not show an act done for the defendant’s benefit: *Wilson v. Barker*, 1 Nev. & M. 409; 4 Barn. & Adol. 614, et seq.; *Smith v. Lozo*, 42 Mich. 6.

* * *

“But the language generally used by judges and text-writers, and such decisions as we have been able to find, is broad enough to cover a case like the present when the ratification is established: (citing numerous authorities).

“The question remains whether the ratification is established. As we understand the bill of exceptions, McCullock took on himself to deliver the defendant’s coal for his benefit and as his servant, and the defendant afterwards assented to McCullock’s assumption. The ratification was not directed specifically to McCullock’s trespass, and that act was not for the defendant’s benefit if taken by itself, but it was so connected with McCullock’s employment that the defendant would have been liable as master if McCullock really had been his servant in delivering the coal. We have found hardly anything in the books dealing with the precise case, but we are of opinion that consistency with the whole course of authority requires us to hold that the defendant’s ratification of the employment established the relation of master and servant from the beginning, with all its incidents, including the anomalous liability for his negligent acts: See *Coomes v. Houghton*, 102 Mass. 211, 213, 214; *Cooley on Torts*, 128, 129. The ratification goes to the relation and establishes it *ab initio*. The relation existing, the master is liable for torts which he has not ratified specifically just as he is for those which he has not commanded, and as he may be for those which he has expressly forbidden * * *.”

Question 173: (1.) State the facts, the question presented and the Court’s decision in this case.

(2.) A purporting to represent P, sells B a quantity of goods. He is guilty of fraud in making the sale. P recognizes the order and supplies the goods. Is P liable in damages for A’s fraud? Under what circumstances?

Sec. 135. Formalities of Ratification.

Case No. 174. *Hawkins v. McGroarty*, 110 Mo. 546.

Facts: See the first paragraph of the opinion.

Point Involved: Generally, whether if the law requires a certain formality in the appointment or authorization of the agent, the act of an agent done without such for-

mality, may be ratified by the principal with any less formality than that required by such law. Specifically, whether the requirements of the Missouri statute of frauds requiring the authorization of an agent to sell lands to be in writing, affords a defense to a principal who is sued on the theory of verbal ratification.

BRACE, J.: "By an act approved March 19, 1887, the statute of 'frauds and perjuries,' section 2513, Revised Statutes, 1879, was amended by adding the following clause to that section: 'And no contract for the sale of lands made by an agent shall be binding upon the principal unless such an agent is authorized in writing to make said contract.' This is an action in the nature of a bill in equity to specifically enforce the written contract of an agent in the name of his principal for a sale of land made by the agent, not within the terms of such agent's written authority, upon the ground of a verbal ratification of such sale by the principal after he was informed thereof. In the facts of the case there is no element of equitable estoppel. Plaintiff's evidence tended at most only to prove that the defendant, when informed by letter of the sale, did not manifest to the agent any disapprobation thereof, but directly thereafter sold to another person.

"The trial court ruled that the written authority must authorize the agent to make the contract which he does make, in order to bind the principal and unless it does so the ratification thereof must be in writing to bind him, citing Story on Agency (9 ed.) sec. 242, and Dispatch Line v. Mfg. Co., 12 N. H. 205, 37 Am. Dec. 203, in which it was held that 'a ratification of an act done by one assuming to be an agent relates back, and is equivalent to a prior authority. When, therefore, the adoption of any particular form or mode is necessary to confer the authority in the first instance, there can be no valid ratification except in the same manner.'

"At common law, where a contract is required to be under seal, a ratification must also be under seal. 1

American & Eng. Encyclopedia of Law 436; Story on Agency, sec. 49, and authorities in note 3; Mechem on Agency, sec. 137, and authorities note 6, same page. And upon the same principle the last author, stating the general rule, says, 'If, therefore, sealed authority was indispensable, sealed ratification must be shown; and if written authority was required, written ratification must appear.' Sec. 136.

"In *Pollard & Co. v. Gibbs*, 55 Ga. 45, it was held that 'where a crop lien for fertilizers is executed by an agent who acts without authority from the principal, and in his absence, and the lien is under seal, proof of the ratification by the principal must be in writing and under seal.'

"In *Ragan v. Chenault*, 78 Ky. 456, under a statute which provided that 'no person shall be bound as the surety of another by the act of an agent, unless the authority of the agent is in writing, signed by the principal;' it was held that subsequent verbal ratification would not bind the surety; that to so hold would be to defeat the object of the statute.

"In *Palmer v. Williams*, 24 Mich. 328, under a statute of frauds, the same as our own, before the adoption of the amendment set out, it was held that 'ratification, if not made in writing, with due knowledge of the circumstances, could only be made out by such conduct on the part of the principal as would equitably estop him from insisting on his rights. And such an estoppel would not be made out unless defendants had been so far misled by him to their own prejudice, that justice demanded their protection against him.

"* * * In the absence of any conduct designed or calculated to mislead, mere delay will not deprive an owner of his estate, legal or equitable, until barred by some clear rule of equity.'

"There is no such bar in the facts of this case. Hiemans was authorized in writing by the defendant Maull to sell his property for \$7,400. On the ninth of July he sold to the plaintiff for \$1,300 who paid Hiemans \$40 earnest money, and received from him a receipt for that

amount on account of the sale. Hiemans says he immediately wrote Maull a letter, and that Maull called the next day, when he explained the sale to him and he manifested no disapprobation. Maull sold to his co-defendant, McGroarty, on the evening of the eleventh. He testifies that he did not see Hiemans until after this sale, and did not receive his letter until the evening of the day he sold to McGroarty, and did not understand from its contents that his agent had actually effected a sale. However the truth of this matter may be, he never received from his agent the earnest money of the plaintiff; in a day or two, he took the check he received from McGroarty for \$50, paid by him as earnest money, to Hiemans (who collected it), and directed conveyances to be prepared to McGroarty, which was accordingly done, the balance of the purchase money paid, and the deeds delivered on the twenty-second of July. In the meantime he never, by any act or word of his, gave the plaintiff to understand for a moment that he had authorized or ratified the sale made by Hiemans to him; but from the first approach to him, made by the plaintiff, to secure a performance of the contract, steadily refused to recognize, ratify or confirm the same.

“Under the statute, as it now reads, requiring written authority for the contract the agents make, there can be no question it would seem, that there is no such ratification here as could by any process of reasoning, bind the defendant Maull to specifically perform the contract in question, which his agent Hiemans had no written authority to make.

Question 174: (1.) State the facts, the question presented and the Court's decision in the above case.

(2.) At common law what was the rule as to the ratification of a sealed instrument?

Sec. 136. Knowledge of Facts by Principal as Essential to Ratification.

Case No. 175. Combs v. Scott, 94 Mass. 493.

Facts: Suit brought to recover the price agreed to

be paid to plaintiff for his services in obtaining two recruits for enlistment in army, as part of the quota of the town of Hawley.

Defendants had charge of a fund for the purpose stated and employed one Dunton as their agent, who in turn employed plaintiff, agreeing to pay \$5.50 for each recruit that he should obtain to the number of two or three and that he did obtain two recruits. Defendants contest Dunton's authority to employ plaintiff as a subagent or make such a contract in their behalf and plaintiff claims ratification. The Court instructed the jury to the effect that there was no ratification of the agent's act if there was a material mistake of fact, "unless it [the mistake] arose from the negligence of the defendants." Plaintiff had a verdict and defendants appeal.

Point Involved: Whether the principal who is claimed to have ratified a past and completed act on the part of his agent can claim a mistake of fact to avoid such ratification when he neglected to ascertain the true facts that might have been made known to him by reasonable diligence.

BIGELOW, C. J.: " * * * The general rule is perfectly well settled, that a ratification of the unauthorized acts of an agent, in order to be effectual and binding on the principal, must have been made with a full knowledge of all material facts, and that ignorance, mistake or misapprehension of any of the essential circumstances relating to the particular transaction alleged to have been ratified will absolve the principal from all liability by reason of any supposed adoption of or assent to the previously unauthorized acts of an agent. We know of no qualification of this rule such as was engrafted upon it in the instructions given to the jury in the present case. Nor, after considerable research, have we been able to find that such qualification has ever been recognized in any approved text writer or adjudicated case. And, upon consideration, it seems to us to be inconsistent with sound principle.

“Ratification of a past and completed transaction, into which an agent has entered without authority, is a purely voluntary act on the part of the principal. No legal obligation rests upon him to sanction or adopt it. No duty requires him to make any inquiries concerning it. Where there is no legal obligation or duty to do an act, there can be no negligence in an omission to perform it. The true doctrine is well stated by a learned text writer: ‘If I make a contract in the name of a person who has not given me an authority, he will be under no obligation to ratify it, nor will he be bound to the performance of it.’ 1.Livermore on Agency, 44. See also Paley on Agency, 171, Note o. Whoever, therefore, seeks to procure and rely on a ratification is bound to show that it was made under such circumstances as in law to be binding on the principal, especially to see to it that all material facts were made known to him. The burden of making inquiries and ascertaining the truth is not cast on him who is under no legal obligation to assume a responsibility, but rests on the party who is endeavoring to obtain a benefit or advantage for himself. This is not only just, but it is practicable. The needful information or knowledge is always within the reach of him who is either party or privy to a transaction which he seeks to have ratified, rather than of him who did not authorize it, and to the details of which he may be a stranger.

“We do not mean to say that a person can be wilfully ignorant or purposely shut his eyes to means of information within his own possession and control, and thereby escape the consequences of a ratification of unauthorized acts into which he has deliberately entered; but our opinion is that ratification of an antecedent act of an agent which was unauthorized cannot be held valid and binding, where the person sought to be charged has misapprehended or mistaken material facts, although he may have wholly omitted to make inquiries of other persons concerning them, and his ignorance and misapprehension might have been enlightened and corrected by the use of diligence on his part to ascertain them. The mistake at

the trial consisted in the assumption that any such diligence was required of the defendants. On this point, the instructions were stated in a manner which may have led the jury to misunderstand the rights and obligations of the parties. Exceptions sustained."

Question 175: What was the instruction given by the lower court in this case? Did the upper court sustain the instruction? What qualification did the Court suggest? Was the act in this case by the agent and by the third party completely executed? If it had not been do you think that could make a difference?

Case No. 176. Ehrmantraut v. Robinson et al., 52 Minn. 333.

Facts: Suit for rent of a certain hall for lodge purposes used by Nora Grove, No. 23, U. A. O. D., an unincorporated association of which defendants were members. In May, 1886, Robinson and Larson, two of the defendants, and directors of the lodge, without authority, procured the lease in question. In July, 1886, the members of the association, including the defendants, entered into possession of the premises, and continued to hold meetings there until some time in the fall when the society disbanded. The lease was never acted on by the society at any of its meetings, and some of the defendants never knew what the terms of the lease were; but they did know that some lease had been entered into.

Point Involved: Whether continuing to receive the benefits under an executory contract made by an agent, of the existence of which contract one knows, but as to whose contents he chooses to remain in ignorance, is ratification of the unknown terms.

MITCHELL, J.: "* * *

"Of course, a benevolent or social club or association of this kind is not a partnership, in any proper sense of that term. The members are liable, if liable at all, for the acts of their associations, on the ground of principal

and agent, and not of partnership. Hence, it is undoubtedly true that only those members who authorized or subsequently ratified the acts of these trustees in taking this lease would be bound by it. *Bates, Partn. 75; Lindl. Partn. 50; Story, Partn. 144; Flemyng v. Hector, 2 Mees. & W. 172; Ash v. Guie, 97 Pa. St. 493.*

“But it is true that all the members who subsequently ratified the act are liable, and in our opinion the act of Hervin and Wilson amounted to a ratification.

“It is sometimes said that, to constitute a ratification of an unauthorized act of an agent, the principal must have had knowledge of all the material facts. As to a past and completed transaction, this would be generally true, but there are many cases where the conduct of the principal may amount to a ratification, although he may not know all the facts as to the unauthorized act of the agent in his behalf. He may ratify by voluntarily assuming the risk without inquiry, or he may deliberately ratify upon such knowledge as he possesses, without caring for more. *Lewis v. Read, 13 Mees. & W. 834; Kelley v. Newburyport & A. H. R. Co., 141 Mass. 496 (6 N. E. Rep. 745.)*

“Where, as in the present case, the defendants Hervin and Wilson had notice that an unauthorized contract had been made in their behalf for the use of these premises, it was their duty, before accepting its benefits, to ascertain what the terms of that contract were. By going into possession, and enjoying the use of the premises, without any attempt to ascertain the terms of the lease under which they entered, they must be held to have deliberately intended to take the risk of ratifying upon such knowledge as they had.”

Question 176: (1.) State the above case, showing whether the Court's holding is consistent with the rule that ratification is predicated upon knowledge of the facts by the ratifier.

(2.) Why was it material in this case to consider whether or not the lodge was a partnership? Why in your opinion was it not a partnership?

Sec. 137. Ratification of Part Ratifies All—Retaining Benefits as Ratification.

Case No. 177. Eberts v. Selover, 44 Mich. 519.

Facts: The facts appear in the opinion.

Point Involved: Whether a principal whose agent has exceeded his authority can adopt and ratify part of such act and reject the remainder.

COOLEY, J.: "This is an action brought to recover the subscription price of a local history. The subscription was obtained by an agent of the plaintiffs, and defendant signed his name to a promise to pay ten dollars on the delivery of the book. This promise was printed in a little book, made use of for the purpose of obtaining such subscriptions, and on the opposite page, in sight of one signing, was a reference to 'rules to agents,' printed on the first page of the book. One of these rules was that 'no promise or statement made by an agent which interferes with the intent of printed contract shall be valid,' and patrons were warned under no circumstances to permit themselves to be persuaded into signing the subscription unless they expected to pay the price charged.

"From the evidence it appears that when Schenck, the agent, solicited his subscription the defendant was not inclined to give it, but finally told the agent he would take it provided his fees in the office of justice, then held by him, which should accrue from that time to the delivery of the book should be received as an equivalent. The agent assented, and defendant signed the subscription, receiving the same time from the agent the following paper:

" 'Coldwater, April 29, '78.

" 'Mr. Isaac M. Selover gives his order for one copy of our history, for which he agrees to pay on delivery all the proceeds of his office as justice from now till the delivery of said history.

" 'Eberts & Abbott, per Schenck.'

"The plaintiffs claim that the history was duly delivered, and they demanded the subscription price, repudi-

ating the undertaking of the agent to receive anything else, as being in excess of his authority and void. The defendant relies on that undertaking, and has brought into court \$1.27 as the amount of his fees as justice for the period named. This statement of facts presents the questions at issue so far as they concern the merits.

“It may be perfectly true, as the plaintiffs insist, that this undertaking of the agent was in excess of his authority; that the defendant was fairly notified by the entries in the book of that fact, and that consequently the plaintiffs were not bound by it, unless they subsequently ratified it. Unfortunately for their case, the determination that the act of the agent in giving this paper was void does not by any means settle the fact of defendant’s liability upon the subscription.

“The plaintiffs’ case requires that they shall make out a contract for the purchase of their book. To do this, it is essential that they show that the minds of the parties met on some distinct and definite terms. The subscription standing alone shows this, for it shows, apparently, that defendant agreed to take the book and pay therefor on delivery the sum of ten dollars. But the contemporaneous paper given back by the agent constitutes a part of the same contract, and the two must be taken and considered together. *Bronson v. Green*, Walk. Co. 56; *Dudgeon v. Haggart*, 17 Mich. 275. Taking the two together it appears that the defendant never assented to any purchase except upon the terms that the plaintiffs should accept his justice fees for the period named in full payment for the book. If this part of the agreement is void, the whole falls to the ground, for defendant has assented to none of which this is not a part. When plaintiffs discovered what their agent had done, two courses were open to them; to ratify his contract, or to repudiate it. If they ratified it, they must accept what he agreed to take. If they repudiated it, they must decline to deliver the book under it. But they cannot ratify so far as it favors them and repudiate so far as it does accord with their interests. They must deal with the defendant’s

undertaking as a whole and cannot make a new contract by a selection of stipulations to which, separately, he never assented."

Question 177: State the facts, the question presented and the Court's decision in the above case.

Case No. 178. Krider v. Trustees of Western College, 31 Iowa, 547.

Facts: Suit for foreclosure of a mortgage, covering the college grounds. Defense that the mortgage was made without authority by Weaver, as president and agent of the college. Weaver was authorized to borrow money for the college but not to make the mortgage in question. Further facts are given in the opinion.

Point Involved: That the ratification of one part of an entire transaction, with knowledge of the facts, ratifies the entire transaction; that receiving benefits (with knowledge of the facts) of an act done under excess of authority is ratification of the entire transaction.

MILLER, J.: "As before stated, the jury found that Weaver was authorized to borrow money on behalf of the corporation, and that the board of trustees ratified his action in giving the note sued on and in the creation of the debt evidenced thereby; and there is no room for controversy that they did so with full knowledge of the fact that Weaver had also, at the same time, executed the mortgage on the college grounds to secure this same debt; that the borrowing of the money for the college and the making of the note and mortgage constituted but one transaction.

"The law is well settled that the principal cannot, of his own mere authority, without the consent of the other party, ratify a transaction by his agent in part, and repudiate it as to the rest. He must either adopt it in whole or not at all. And hence, the general rule is deduced, that where a ratification is established, as to a part, it operates as a confirmation of the whole of that

particular transaction of the agent. Story on Agency, 250, and cases cited in notes.

“In this case the board of trustees send their president out, clothed with authority to borrow money on their credit. He does so; executes a promissory note in the name of the board of trustees as evidence of the loan, and to secure the payment thereof, according to the terms of the note, executes a mortgage upon property belonging to the corporation, whose agent he is; and afterward they, with full knowledge of all the facts, ratify the creation of the debt and the giving of the note. By these acts, without more, they have, so far as they had the power, confirmed the entire transaction, including the making of the mortgage.

“These conclusions are drawn from the findings of the jury, the correctness of which appellee does not question. But, upon the evidence in the case, we are of the opinion that there was never, in fact, any repudiation, by the board of trustees, of the making of the mortgage by their president. On the other hand it is quite conclusive to our minds, that the execution of the mortgage was expressly ratified, and that the answer of the jury to the sixth interrogatory is against the evidence.”

Question 178: What were the facts, the question presented and the Court's decision in the above case?

(Note: See also, *Dempsey v. Chambers*, *supra*.)

Sec. 138. Silence as Ratification.

Case No. 179. Ward v. Williams, 26 Ill. 447.

Point Involved: Whether merely remaining silent (i. e. receiving no benefits and expressing no dissent) when one learns that an agent has done an unauthorized act in his behalf, is ratification.

CATON, C. J.: “* * *

“The counsel in their arguments agree upon the cor-

rect principle of law as to the ratification of unauthorized acts, done by one in the name of another. In general where an agent is authorized to do an act, and he transcends his authority, it is the duty of the principal to repudiate the act as soon as he is fully informed of what has been done in his name, by the agent, else he will be bound by the act as having ratified it by implication: but where a stranger in the name of another does an unauthorized act, the latter need take no notice of it although informed of the act thus done in his name, and he shall only be bound by an affirmative ratification."

Question 179: What is the rule as to silence amounting to ratification as announced in the above case?

Sec. 139. Suit as Ratification.

Case No. 180. Bailey v. Partridge, 134 Ill. 188.

Facts: Plaintiff's traveling salesman sold the samples with which he had been provided, and received the price thereof, appropriating it to his own use. Plaintiff contended he had no authority to make the sale, but brought suit for the price thereof based on the sale.

Point Involved: Whether suit on an unauthorized contract made by an agent is a ratification of such contract.

MR. JUSTICE CRAIG: "But it may be said that Holmes was not empowered by the plaintiffs to sell the goods,—that he merely held the samples as a means to solicit orders. A sufficient answer to this position is, that the acts of plaintiffs since the sale may be regarded as ratification. Where the owner whose goods have been sold without authority, sues the purchaser for the amount of the contract price for which the goods were sold, the sale, although unauthorized, will be regarded as ratified. (Story on Agency, sec. 259; 2 Greenleaf on Evidence, sec. 66.) The later authority says: 'Thus, if goods are sold without authority, and the owner receives the price, or pursues his remedy for it by action at law against the pur-

chaser, or if any other act be done on behalf of another, who afterwards claims the benefit of it, this is a ratification.' See, also, *Peters v. Balleston*, 3 Pick. 495.

"In the case under consideration, as soon as plaintiffs learned of the sale they made out a bill according to the contract price, presented it to the defendants, and demanded payment for the goods. This was followed by the present action in assumpsit to collect the amount for which the goods were sold. If, therefore, Holmes made the sale without direct authority, these acts of the plaintiffs, after full knowledge of the sale, may be treated as a ratification of the sale made by Holmes. The case then stands in this position: Holmes had possession of the goods, claiming the right to sell; he called on defendants and they bought the goods; he delivered the goods, collected the pay, and gave defendants a receipt acknowledging full payment. Plaintiffs first deny authority to sell, but by their acts concede the power of sale, but deny authority to collect for the goods. This they can not do. The power of sale or the sale without authority, subsequently ratified, carried with it the implied power to receive payment. Had the sale been repudiated by the plaintiffs, and an action brought to recover the goods, a different question would arise. But that course was not pursued."

Question 180: (1.) State the facts, the question presented and the Court's decision in the above case.

(2.) By what action could the plaintiffs have won? Why?

Sec. 140. The Effect of Ratification.

(Note: Ratification when established has these results:

(1.) It *relates back* to the time when the act was done and is equivalent to prior authority:

(a) In its effect between principal and third person.

(b) In its effect between principal and agent.

(2.) It is *irrevocable*; ratification being established, it cannot be withdrawn by the principal.)

PART VI

MUTUAL RIGHTS AND DUTIES OF PRINCIPAL AND AGENT

- Chapter Twenty-three. The Rights of the Principal
 Against the Agent.
- Chapter Twenty-four. The Right of the Agent to Com-
 pensation and Damages.

CHAPTER TWENTY-THREE

THE RIGHTS OF THE PRINCIPAL AGAINST THE AGENT

- | | |
|---|---|
| A. The agent's duty to exercise good faith and protect the principal's interests. | respect to delegation of authority and the employment of other agents. |
| B. The agent's duty to obey instructions and exercise prudence and skill. | D. The agent's responsibility in case of default by the third person on the contract made through the agency. |
| C. The agent's rights and duties in | |

A. The Agent's Duty to Exercise Good Faith and to Protect the Principal's Interests.

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|---|---|
| § 141. The general rule. | § 144. Agent must not compete with principal. |
| § 142. Agent as representative of both parties without their consent. | § 145. Agent's duty in regard to personal behavior. |
| § 143. Agent must not deal with himself without principal's consent. | |

Sec. 141. The General Rule.

Case No. 181. Keighler et al. v. Savage Mfg. Co., 12 Md. 383.

Facts: Bill brought to compel an accounting by defendants, as alleged agents of the complainants, of their dealings with the complainant's funds and securities, alleging that defendants had made secret profits and unauthorized uses of the agency.

LE GRAND, C. J.: (On appeal upholding the action of the lower court in granting complainant relief.) “* * * In the final decision of this case, the law governing the relation of principal and factor, is applied to the dealings of the parties. What that law is—so far as this case is concerned—we shall, as concisely as may be, state.

“Its paramount and vital principle is good faith: without it the relation of principal and agent cannot exist; and so sedulously is this principle guarded that all departures from it are esteemed frauds upon the confidence bestowed. * * *”

Question 181: Do the principal and agent (after the creation of the agency) deal at “arm's length”? What is the rule?

Sec. 142. Agent as Representative of Both Parties Without Consent of Both.

Case No. 182. Gann v. Zettler, 3 Geo. Ap. 589.

Facts: The facts are stated in the second paragraph of the opinion.

Point Involved: As a premise, whether it is a breach of duty for an agent without the consent of his principal, to represent the other party in the same transaction; as a result, whether the agent in so acting forfeits his rights to his fees.

POWELL, J.: “It is recorded of him, ‘who spake as never man spake,’ that seeing the multitudes, he went up

into a mountain; and when he was set his disciples came unto him, and he opened his mouth and taught them, saying * * * 'No man can serve two masters: for either he will hate the one, and love the other; or else he will hold to the one, and despise the other.' So, also, is our law. Civil Code, secs. 3010, 3011, 3014, 3018. Whosoever, having undertaken the service of his master, counsels with another and agrees also in those same things wherewith he has been trusted, cannot claim the reward promised by his master, unless he makes it plain that he has not acted privily, but that his master was consenting thereto (citing cases).

"In this case a woman owning a house placed it with an agent, instructing him to sell it for her for \$1,500. A man desiring to buy the house, but not for cash, hired this agent to become also his agent to buy it of the woman through other means, making known to him that he was willing to give, in exchange for the woman's house, a piece of land which he owned and \$1,200 in notes. The agent not telling the woman that he had become the agent of the man, got from her an agreement to take, in exchange for her house, the man's land, and notes for \$1,000; and she therewith also consented that if the agent could get the man to give more than this sum, he should have it for his pay. However, before the trade was ended, the woman, having obtained knowledge that the man had already offered to give more than the land and the \$1,000 which had not been told her, put the agent aside and dealt directly with the man, to her better advantage. The agent, learning of these things, sued her for \$200; and the judge gave judgment in her favor.

"Judgment affirmed."

Question 182: (1.) State the facts, the question presented and the Court's decision in the above case.

Case No. 183. Rice v. Wood, 113 Mass. 133.

Facts: This is a suit by the plaintiffs as real estate brokers to recover a commission from defendant for dis-

posing of certain stocks in exchange for real estate. The plaintiffs were at the same time employed by certain parties to sell or exchange their real estate. Through the instrumentality of plaintiffs, an exchange was effected. Plaintiffs were to receive a commission from defendants, and also from the owners of the real estate, defendant knowing this at the time, but the real estate owners did not know of it. The defendant contends that plaintiffs cannot recover, because they violated their duties as agents with the other party to the contract, the real estate owners.

Point Involved: Whether an agent employed by A to sell his property on a commission who without A's knowledge contracts in the same matter with B to represent and receive a fee from B, who has full knowledge of all the facts, can recover his fee from B.

DEVENS, J.: “* * *

“If this were an action by the plaintiffs against the owner of the real estate, for commissions earned in disposing thereof, the decision of this court in *Farnsworth v. Hemmer*, 1 Allen, 494, would be conclusive against the claim, upon the ground that the plaintiffs, if such facts should be proved, had entered into a relation inconsistent with the confidence reposed in them by such owner, and placed themselves in a position antagonistic to his interests. This case presents, however, the question whether, conceding that the plaintiffs could not recover their commissions from the owner of the real estate, they may not recover those they claim to be entitled to from the defendant, as he knew fully, at the time of entering into his contract, the relation in which the plaintiffs stood to the third party.

“It was the duty of the plaintiffs to get the highest price for the real estate that could be obtained for it in the market; while the contract between the plaintiffs and the defendant was an inducement to the plaintiffs to effect a sale to the defendant, even if it was on lower terms than might have been obtained from others, because they

thereby secured their commissions from both parties. It was therefore an agreement which placed the plaintiffs under the temptation to deal unjustly with the owner of the real estate. *Walker v. Osgood*, 98 Mass. 348.

“Contracts which are opposed to open, upright and fair dealing are opposed to public policy. A contract by which one is placed under a direct inducement to violate the confidence reposed in him by another is of this character. * * * No one can be permitted to found rights upon his own wrong, even against another also in the wrong. A promise made to one in consideration of doing an unlawful act, as to commit an assault or to practice a fraud upon a third person, is void in law; and the law will not only avoid contracts the avowed purpose or express object of which is to an unlawful act, but those made with a view to place, or the necessary effect of which is to place, a person under wrong influences, and offer him a temptation which may injuriously affect the rights of third persons. Nor is it necessary to show that injury to third persons has actually resulted from such a contract, for in many cases where it had occurred this would be impossible to be proved. The contract is avoided on account of its necessarily injurious tendency. *Fuller v. Dame*, 18 Pick. 472. * * *”

Question 183: (1.) State the facts, the question presented and the Court's decision in the above case, giving the reasons.

(2.) A was an expert judge of pianos. B, being about to purchase a piano, requested A as his friend and gratuitously to examine a piano which C was attempting to sell to B. C secretly promised A a fee if the piano was sold to B. A believed the piano a good instrument and he recommended it and B bought it. B has never complained and is entirely satisfied with the piano. A sues C for the fee promised. Can he recover? (*Bollman v. Lewis*, 41 Conn. 581.)

Sec. 143. Agent Must Not Deal with Himself without Principal's Consent.

Case No. 184. *Blank v. Aronson*, 187 Federal, 241.

Facts: Suit in equity by Aronson against Blank to set aside a conveyance by Aronson. Aronson employed Blank to find a purchaser for a tract of land owned by him in Barnes County, North Dakota. Blank thereupon produced Elmer W. Fish, as a proposed purchaser at the price of \$14 per acre, which Blank represented was all that he could get. On December 3, 1906, a contract of sale was entered into between Aronson and Fish for that price, Fish agreeing to pay \$2,300 in cash, and \$2,000 more on or before December 1, 1907, when the deed was to be given, and to give his notes, secured by mortgage, for the balance. On November 1, 1907, Blank appeared to be Fish's assignee of the right to purchase, and Aronson accordingly made the deed to him. Aronson now charges that when Blank acted as his agent, he had a personal interest in the purchase which was concealed from Aronson.

Point Involved: Whether an agent employed to sell real estate has the right without the consent of the principal, to purchase it himself.

ADAMS, CIRCUIT JUDGE: “* * *

“* * * If the charge found in the bill is sustained by the proof, the sale ought to be annulled. There is no principle of law, equity or morals more universally recognized than this: that an agent must be faithful to his principal in the discharge of the duty which he undertakes. He cannot purchase for himself that which his duty requires him to sell for his principal. ‘*Emptor emit quam minimo potest, venditor vendit quam maximo potest.*’ His own interest is a constantly acting force inducing him to unfaithfulness in the discharge of the duty undertaken by him. As said by the Supreme Court of the United States in *Michoud v. Girod*, 4 How. 503, 554, L. Ed. 1076:

“‘The general rule stands upon our great moral obligation to refrain from placing ourselves in relations which ordinarily excite a conflict between self interest and integrity. * * * It therefore prohibits a party

from purchasing on his own account that which his duty or trust requires him to sell on account of another.'

"These salutary principles have been repeatedly laid down and enforced by this court. * * *

[The court here considers the evidence.]

"On these findings it is clear that defendant while acting as the paid agent of complainant to serve him faithfully in finding a purchaser for his land, had a secret agreement or understanding with Fish, with whom he negotiated the sale, and who ostensibly became the purchaser, that he the defendant should have a substantial interest in the trade. This, under the authorities cited entitled complainant to rescind the sale, and to a restoration of the title upon complying with the established rule in equity to place the defendant in *statu quo*. * * *

"But it is contended that complainant did not promptly and unequivocally rescind the sale after being advised of defendant's fraud. The well settled rule on this subject is that one entitled to rescind a contract on the ground of fraud must announce his purpose to do so promptly, unconditionally and unequivocally upon the discovery of the fraud practiced upon him * * *.

"The learned trial judge * * * found distinctly this to have been done. * * *,"

Question 184: State the facts, the question presented and the Court's decision in the above case.

Sec. 144. Agent Must Not Compete with Principal.

Case No. 185. Deringer v. Meyer, 42 Wis. 311.

Facts: For the year 1875 the plaintiff was employed by defendant to superintend defendant's business at New Cassel, Wisconsin, consisting in conducting a lumber yard and buying and selling wood. Plaintiff while in defendant's service engaged in a wood business on his own account, selling in the same market. Defendant discharged plaintiff in June, 1875. Plaintiff sues for damages for wrongful discharge.

LYON, J.: "It is well settled that if a servant, without the consent of his master, engage in any employment or business, for himself or another, which may tend to injure his master's trade or business, he may lawfully be discharged before the expiration of the agreed term of service. This is so because it is the duty of the servant, not only to give his time and attention to his master's business, but, by all lawful means at his command, to protect and advance his master's interests. But when the servant engages in a business which brings him in direct competition with his master, the tendency is to injure or endanger, not to protect and promote the interests of the latter. * * *

"The fact may be in certain cases that, notwithstanding the servant has engaged in a rival business, still he has given his whole time and attention to the business of his master. An attempt was made to show that this is such a case. But the existence of that fact will not take a case out of the rule above stated, for the reason that the servant would yet have an interest against his duty.

* * *"

Question 185: (1.) State the right of an agent to compete with his principal.

(2.) If the agent has not agreed to give his entire time to the business of his master, may he employ his extra time in rivalry to his principal? Why?

Sec. 145. Agent's Duty in Regard to Personal Behaviour.

Case No. 186. Bass Furnace Co. v. Glasscock, 82 Ala. 452.

Facts: Plaintiff sues for his wrongful discharge. He was employed at \$50 a month to reduce wood to charcoal on defendant's land. "The evidence tends to show that the plaintiff a short while before his discharge, was drunk on the premises of the defendant, where an iron furnace was in process of operation, about four miles away from 'the coaling,' as it is called, and while so intoxicated he

there 'raised a disturbance and had a fight with a man.' At another time he was seen 'drunk, in a wagon with some negro women, going toward the coaling.' This is all that is shown by the evidence bearing on this point." There was no evidence to show that he thereby incapacitated himself from service or failed to give the service his contract expressly called for.

Point Involved: The right to discharge a servant on account of his personal habits.

SOMERVILLE, J.: " * * *

"The court charged the jury, that 'the fact that the plaintiff was drunk once, or a number of times, at the furnace or elsewhere, during his employment under the contract, is no evidence against plaintiff's right of recovery, unless drunkenness incapacitated and caused the plaintiff to fail in his part of the contract.' Is this a correct statement of the law on this subject?

"To justify an employer in discharging a servant, or employee, the rule, no doubt, is that the servant must have been guilty of conduct which can be construed to be a breach of some express or implied provision in the contract of service. It seems to be settled, that it is an implied part of every contract of service, that the employee will abstain from habitual drunkenness, or repeated acts of intoxication, during the period of his employment. If he be guilty of this indulgence, his conduct will justify his dismissal. 2 Add. Cont. (Morgan's ed.), § 890; *Wise v. Wilson*, 1 Car. & K. 662; 2 Pars. Cont. 36 note (f); *Gonsolis v. Gearheart*, 31 Mo. 585; *Huntington v. Cloffin*, 10 Bosw. 262. There may be circumstances, however, under which a single act of drunkenness would warrant a servant's discharge; as, for example, in the case of a minister of the gospel, where the act might bring personal reproach, and tend to degrade the moral standard of religion; or of a family physician, where it might result in negligence or malpractice in pharmacy or surgery. *Wood on Mast. and Serv.*, § 111, p. 213. The same act, when committed by a day laborer, in privacy, and

when off duty, or on some rare occasion when great temptation was presented, might not be a sufficient excuse for his discharge. The rule is stated by a recent author to be, that intoxication, while in service, is generally a good excuse for discharging a servant, particularly when it is habitual, and interferes with the discharge of his duties, or will be likely to. But it is held, that as to whether it is to be regarded as a proper excuse, depends upon the occasion. Wood on Mast. and Serv. § 3, p. 213. We do not doubt that public drunkenness of any employee, while in the service of his employer, and manifesting itself in boisterous and disorderly conduct, either toward the employer or third persons, is such misconduct as to constitute a violation of the stipulation, implied in every contract of service, that the employee will conduct himself with such decency and politeness of deportment as not to work injury to the business of the employer. This he can do by a single act of drunkenness, which may tend to offend the reasonable prejudices or tastes of the public, or impair their confidence, or render him disagreeable in social or business intercourse. The drunkenness of employees may well deter the patrons of any business establishment from continuing their business intercourse with it, especially when social contact is frequently necessary to its consummation. It may prove also equally offensive to the master or employer, who may justly regard sobriety as an indispensable element of efficient service. The charge of the court laid down the rule, that no drunkenness justified the plaintiff's discharge, unless it incapacitated him, and caused him to fail in the performance of his part of the contract. This under the principles above declared was erroneous, and must work a reversal of the cause."

Question 186: (1.) State the facts, the question presented and the Court's decision in this case.

(2.) On what general principle does misbehaviour of the servant give the master a right to discharge him?

(3.) The P. R. R. Co. employs A as a locomotive engineer for one year. Nothing is said in the contract about drinking alco-

holie liquors. The company passes a rule that all employees must abstain from such liquors. A drinks beer in moderation. He is threatened with discharge unless he quits and not quitting, is discharged. He sues for damages. Recover?

B. The Agent's Duty to Obey Instructions and Exercise Prudence and Skill.

§ 146. Agent's duty to obey instructions.

§ 147. The agent's duty to exercise prudence and skill.

Sec. 146. Agent's Duty to Obey Instructions.

Case No. 187. Johnson v. New York Central Transp. Co., 33 N. Y. 610.

Facts: Action against a railroad company for loss of hemp. The loss did not occur on the defendant's line, but took place after the goods had been delivered to a connecting carrier, defendant's contract of carriage simply covering its own line. The consignors had, however, given instructions as to the connecting carrier and these were disobeyed by the initial carrier, the defendant.

Point Involved: The duty of the agent to obey the instructions of his principal.

PORTER, J.: "The defendant undertook to transport the flax to Albany, and to forward it thence to New York by the People's Line of steamboats. On the refusal of that line to receive it, the defendant's obligation as a carrier ceased; and if it incurred any further liability, it was in the character of agent for the owner of the property. In the absence of instructions as to the mode of transportation from Albany, it owed no duty to the plaintiff, beyond the delivery of the property, in the usual course of business, to safe and responsible carriers for transmission to its destination: *Brown v. Dennison*, 2 Wend. 593; *Van Santvoord v. St. John*, 6 Hill, 157. But when the forwarding agent is instructed as to the wishes of his principal, and elects to disregard them, he is guilty

of a plain breach of duty. When he sends goods in a mode prohibited by the owners, he does it at his own risk, and incurs the liability of insurer: *Ackley v. Kellogg*, 8 Cow. 225.

“It appears in the present case that the contract was made with the freight agent of the defendant, who suggested that it would be better to forward the hemp by tow-boat from Albany; but the plaintiff replied, in substance, that it was so late in the season that he would not send it, unless it could go by the People’s Line. This proof tends to show that the defendant received the property with an express understanding that the hemp was not to be forwarded to New York unless by the People’s Line. If this was so, the defendant was clearly liable. On the refusal of the steamboat proprietors to receive the property, the company should either have communicated the fact to the plaintiff, and awaited further instructions, or it should have relieved itself from liability, by depositing the hemp for safe-keeping in a suitable warehouse: *Forsyth v. Walker*, 9 Pa. St. 148; *Goold v. Chapin*, 20 N. Y. 259 (75 Am. Dec. 398); *Fisk v. Newton*, 1 Denio, 451 (43 Am. Dec. 649).

“There is a class of cases in which an agent is justified by an unexpected emergency in deviating from his instructions, where the safety of the property requires it. In this instance no such exigency arose. The only inconvenience which would have resulted to the owner from compliance by the carrier with his known wishes would have been mere delay in transmitting the hemp to market; and he had notified the company that he would rather submit to this delay than to the hazard of tow-boat transportation, at the close of the season of navigation. The primary duty of the agent is to observe the instructions of his principal, and when he departs from these, he must be content with the voluntary risk he assumes: 1 *Parsons on Contracts*, 69; *Forrester v. Boardman*, 1 Story, 43; *Ackley v. Kellogg*, 8 Cow. 223.”

Question 187: (1.) State the facts, the specific question presented and the Court’s decision.

(2.) What did the Court say about a class of cases in which an agent is justified in disobeying instructions?

(Note to above case: In some states a carrier which accepts goods destined to a point beyond the terminus of its own line, undertakes the liability of a common carrier for the entire distance, unless it affirmatively stipulates otherwise. In other states (as in the case above), its duty is that of carrier only while the goods are upon its own line, its further obligation being merely that of a *forwarder*, that is, to deliver the goods to a responsible connecting carrier or to the carrier designated by the consignor. The Interstate Commerce acts of the United States now make a carrier which accepts interstate shipments liable as a carrier for the entire distance.)

Case No. 188. Wilson v. Wilson, 26 Pennsylvania St. 393.

Facts: Thomas Wilson sued Matthew C. Wilson to recover the sum of \$200. Matthew, residing in Pennsylvania, had in his hands \$300, belonging to Thomas residing in North Carolina. Thomas wrote, "You can send inclosed in letter in \$50's or \$100 notes on par banks, * * *. Only be careful and send it carefully folded up and sealed." The defendant purchased 18 bills chiefly in denominations of \$5, \$10 and \$20, and one of \$100 and enclosed the same in a letter carefully folded and sealed and properly addressed and stamped. This letter never reached its destination.

This suit is brought on the ground that defendant by disobeying instructions assumed the risk.

Point Involved: Whether a direction to send money in a particular way, imposes on an agent who sends it in another manner, the risk of loss.

LEWIS, C. J.: "The primary obligation of an agent, whose authority is limited by instructions, is to adhere faithfully to those instructions, in all cases to which they ought properly to apply: Story on Agency, 192. He is in general bound to obey the orders of his principal ex-

actly, if they be imperative and not discretionary; and, in order to make it the duty of a factor to obey an order, it is not necessary that it should be given in the form of a command. The expression of a wish by the consignor may fairly be presumed to be an order: Story on Contracts, 359, Brown v. McGran, 14 Peters, 494. It is true that instructions may be disregarded in cases of extreme necessity arising from unforeseen emergencies, or if performance becomes impossible, or if they require a breach of law or morals: Story on Agency, 194. These are, however, exceptional cases. There may, perhaps, be others which have been sanctioned by adjudications, founded on the principle that the departure complained of was not material. But the general rule is as indicated in what has been said, and the case before the Court is not brought within any of the exceptions. To justify a departure from instructions, where a loss has resulted from such deviation, the case must be brought within some of the recognized exceptions. It is not sufficient that the deviation was not material if it appear that the party giving the instructions regarded them as material, unless it be shown affirmatively that the deviation in no manner contributed to the loss. * * * As between vendor and vendee, the right of property and the consequent risk vests on delivery of the goods purchased to the designated carrier, packed, and directed according to usage or instructions. But if a different method of packing and directing, or a different carrier than the one designated, be adopted by the vendor, he assumes the risk in case of loss, unless it be shown that his deviation in no way contributed to the loss. Where the goods are stolen, how can this be shown? In sending bank-notes by mail, it is manifest that while a large package would attract the attention and care of honest agents on the route, it might tempt the cupidity of dishonest ones. The party who proposes to take the risk of this method of remittance has a right to weigh the advantages and disadvantages of the money to be remitted in notes of \$100 or \$50, the debtor has no right to

increase the size of the package by remitting in notes of \$10 or \$5. There was no error in permitting the jury to find that the departure from instructions was immaterial."

Question 188: (1.) What did the Court hold in this case?

(2.) State the exceptions suggested by the Court which would justify a disregard of instructions.

Sec. 147. Agent's Duty to Use Prudence and Skill.

Case No. 189. Whitney v. Martin, 88 N. Y. 535.

Facts: Suit to recover a sum of money invested by defendant's testator for plaintiff, in second mortgages, the property not being of sufficient value to satisfy the first mortgages. The deceased (whose executor is sued herein) was an attorney at law and the agent of the plaintiff and having money to invest for plaintiff, invested the same in second mortgages in New York City.

Point Involved: Generally, of the duty of an agent to use care, prudence and skill. Specifically, the rule applied to the case of an attorney at law having money of his principal to invest who invests the same in second mortgages with scant security.

MILLER, J.: " * * * Although there was a contradiction in the testimony in regard to the testator's relation to the plaintiff, it was sufficient, nevertheless, to warrant the conclusion that the testator was intrusted by the plaintiff with making the loan, and the duty devolved upon him to see that the money was safely and securely invested. The responsibility of an agent or attorney under such circumstances is beyond dispute and the rule is well settled that the agent is not only bound to act in good faith, but to exercise reasonable diligence and such care and skill as is ordinarily possessed by persons of common capacity engaged in the same business. (Here the Court reviews the evidence showing that the security was inadequate.) Loans under such circumstances are

always hazardous and doubtful, and, while the attorney or agent may be exonerated, where the party had full knowledge of their existence and the value of the property, it would be a very unsafe rule to hold as a matter of law, that an agent would be justified without an understanding by the party of the true character of the prior encumbrance, under circumstances like these here presented.

“The right of an agent to advance funds on second mortgages or security not of the first class may well be questioned. (McQueen’s Appeal Cases, 236.) And as a general rule it may properly be laid down that it is not prudent or safe to advance moneys on second mortgages where there are large prior encumbrance and especially where the personal security of the mortgagor is in any way precarious. Such an investment is not a first class one. * * * And as this case is presented upon the evidence, we are brought to the conclusion that the agent exceeded his authority and was chargeable with a want of proper care and skill in making the investment; and for this neglect he is legally liable for the loss sustained. * * *”

Question 189: (1.) State the duty of an agent to exercise care, prudence and skill.

(2.) Suppose in this case, the owner of the money, being *sui juris*, had specifically directed the investment of the money in this particular security. Would the agent be liable on the failure of the investment?

(3.) Suppose that the agent was not professional and known to have no experience or skill in such matters and claimed none. Would this make any difference?

C. The Agent’s Rights and Duties in Respect to Delegation of Authority and the Employment of Other Agents.

§ 148. Duties which agent must personally perform.

§ 149. Duties he may entrust to others but for whose proper performance he remains personally liable.

§ 150. Duties which he may delegate to others and for whose performance after such delegation he is not responsible.

Sec. 148. Duties Which Agent Must Personally Perform.

Case No. 190. Commercial Bank of Lake Erie v. Norton & Fox, 1 Hill (N. Y.) 501.

Facts: Suit on two bills of exchange held by plaintiffs as endorsees. The acceptances of the bills were signed "E. Norton & Co.—Per A. G. Cochrane." Defense that the bills were accepted without authority. The evidence was that Henry Norton was a general agent of the firm and had authority by the practice of the house to accept bills of exchange drawn on the firm, and that said Henry, directed Cochrane to accept these bills of exchange.

Point Involved: Whether the authority of an agent to do the ministerial act of writing an acceptance on a bill of exchange, could be delegated by him to another.

COWEN, J. " * * * But it is said he (Henry Norton) could not delegate the power to accept. This is not denied, nor did he do so. The bills came for acceptance, and having as agent made up his mind that they should be accepted, he directed Cochrane, the book keeper, to do the mechanical part—write the acceptance across the bills. He was the mere amanuensis. Had any thing like the trust which is in its nature personal to an agent, a discretion for instance to accept what bills he pleased, been confided to Cochrane, his act would have been void. But to question it here would be to deny that the general agent of a mercantile firm could retain a carpenter to make a box, or a cooper to make a cask. * * * "

Question 190: (1.) What was the question in this case and what did the Court decide?

(2.) What acts may an agent allow others to perform, and what acts must he do in person? What are illustrations stated in this case? Suggest others.

Sec. 149. Duties the Agent May Entrust to Others But for Whose Performance He Remains Personally Liable.

(Note: See the case in the section next preceding. Mere

ministerial acts an agent is not bound to personally perform. Yet this does not mean he is not responsible for their proper performance. What his agents and clerks do for him, he does, and he is responsible.)

Sec. 150. Duties Which an Agent May Delegate to Others and for Whose Performance After Such Delegation He Is Not Responsible.

Case No. 191. First National Bank of Pawnee City v. Sprague, 34 Nebr. 318.

Facts: The facts appear in the opinion. ,

Point Involved: The liability of a bank receiving negotiable paper for collection for the defaults of its correspondent to whom by reason of the paper being collectable in another place, it has with the owner's knowledge, found it necessary to send such paper.

Post, J.: "On the 3d day of February, 1888, at Pawnee City, in this state, the defendant in error drew a sight draft on Davis & Wedd, residing at Canon City, Colo., of which the following is a copy: '\$85.75. First National Bank, Pawnee City, Neb., Feb. 3, 1888, Pay to the order of First National Bank of Pawnee City, Neb., eighty-five and 75-100 dollars, with exchange and collection charges; value received; and charge the same to account of H. W. Sprague. To Mess. David & Wedd, Canon City, Colo. No. C. 5238.' The said draft was by the drawer left with the plaintiff in error at its banking house in Pawnee City for collection, and by it forwarded for collection to the Exchange Bank of Canon City, Colo., and by the latter collected in full from the drawees. The last-named bank failed, and without having remitted the proceeds of the said draft; and no part thereof has been paid, either to the plaintiff or the defendant in error. There is no controversy with reference to the facts on this branch of the case. Defendant in error was a customer of the bank, and was in the habit of shipping butter to parties at distant points, and making sight drafts therefor payable to its or-

der, credit being given him for the proceeds thereof, when collected. It further appears that defendant in error was permitted by the bank to overdraw his account by reason of such collections. It does not appear that plaintiff in error was in the habit of making any charge for collecting said drafts. With reference to the transaction in question he testifies as follows: 'Question. Did you expect them to charge you anything for collecting this draft?' Answer. 'Not directly. I think not. If I had not been doing my banking business with them, I would expect to pay them; but as I was doing my business there, and they charged two per cent for overdrafts, I supposed they did this as a favor.' There is no pretense that the bank in this case was guilty of negligence in forwarding the draft, in the selection of its correspondent, or in giving instructions to the latter with reference to the collection, or remittance of the money when collected.

"The only question for consideration is whether the plaintiff in error, in view of the facts stated, is answerable for the default of the bank at Canon City. The Court, on its own motion, gave the following instructions: 'The Court instructs the jury that when a home bank receives for collection merely a draft drawn upon a person residing in another place, which draft, from the nature of the business and general usage in such cases, will have to be transmitted for collection to some correspondent bank at the place where the debtor resides, and for the collection of which draft the home bank will receive only the customary exchange, in the absence of any express agreement between the parties to the contrary, the home bank, if it exercises due and ordinary care in selecting such correspondent bank, and transmits such draft for collection to such correspondent bank, will not be liable for the default or failure of such correspondent bank to remit moneys collected by it upon such draft.' If this instruction correctly states the law applicable to the case, the motion for a new trial should have been sustained. The courts, as well as text-writers, differ widely upon the question presented. It is held by the courts of

the United States, New York, New Jersey, Ohio, Indiana, Minnesota, and perhaps others, following the English cases, that where a note or bill is received for collection by a bank, and by it transmitted to a correspondent at a distance for presentment and demand, the latter is the agent of the transmitting bank only, which will be liable for the defaults of its correspondent. This view is also approved by Mr. Daniel in his work on Negotiable Instruments (vol. 1, p. 324). The leading case holding this is *Allen v. Merchants Bank of New York*, 22 Wend. 215, 34 Am. Dec. 314, in which by a vote of 14 to 10 senators, the opinion of Chancellor Walworth in the same case was overruled, and which has since then been followed and approved by the court of appeals in numerous cases. It will be observed, too, that when this rule was adopted by the supreme court of the United States (*Hoover v. Wise*, 91 U. S. 308, 23 L. ed. 393) dissenting opinions were filed by Justices Miller, Clifford and Bradley. Mr. Freeman in a note to *Allen v. Merchants Bank of New York*, 34 Am. Dec. 315, while expressing a preference for the rule above stated says, 'The preponderance of authority is against the principal case and in favor of the rule that the liability of a bank taking a note or bill for collection, which is payable at a distance, extends merely to the selection of a suitable and competent agent at the place of payment, and to the transmission of the paper to such agent with proper instructions, and that the corresponding bank is the agent, not of the transmitting bank but of the holder, so that the transmitting bank is not liable for the default of the correspondent where due care has been used in selecting such correspondent.' The foregoing proposition is sustained by the following cases: (citing numerous cases). * * * The doctrine of these cases is expressly approved in *Morse on Banks & Banking*, 3d ed. chap. 17. A discussion of the reasons, which have often been advanced by courts in support of the opposing views of the question involved will not be profitable in this connection. In our opinion, the rule stated in the instruction given by the Court and set out above is not only in accord

with the weight of authority, but is sustained by reasons sounder in themselves and more in consonance with the principles which underlie and determine the relations of principal and agent.

“This is believed to be a typical case, and to be fairly illustrative of the method of making collections through the agency of banks in this country at this time. Whatever may have been the reasons arising out of the business methods existing at the time *Allen v. Merchants Bank of New York* was decided for the rule adopted therein, the reason for such a rule is wanting in view of the present changed conditions. Banks, as a general rule, have now no facilities for making collections at distant points, not enjoyed by the business public at large. Formerly they may have enjoyed a monopoly of information relative to location, names and credit of banks at distant or remote points. To-day, however, business men, by means of the information derived from the press and the numerous directories at their command, may collect their bills through the medium of banks at the place of payment as cheaply, safely and expeditiously as their local bank. It is more convenient, and therefore more frequent, for customers to deposit drafts and acceptance with their home banks for collection, paying therefor the cost of exchange only. * * *

Question 191: (1.) What is the duty of the bank in respect to selecting correspondents?

(2.) Do you think it might be material whether the bank received more than the customary exchange?

D. The Agent's Responsibility in Case of Default by the Third Person on Contracts Made Through the Agency.

§ 151. In general.

§ 152. On *del credere* appointments.

Sec. 151. In General.

(Note: All agents except agents *del credere* are mere in-

intermediaries and do not become liable to the principal for the other person's failure to perform the contract. Such is not the intention of the parties, nor would it be just and reasonable.

It is true the agent may have an obligation arising from the nature of his calling or other circumstances, to choose responsible parties with whom to deal, but his responsibility in that connection arises on another theory.)

Sec. 152. On Del Credere Appointments.

Case No. 192. Wolff v. Koppel, 2 Denio (N. Y.) 368.

Facts: Suit by a principal against his factor on the factor's undertaking that all the sales made by him should be paid for. Defense that the promise was oral and as such not binding under the provisions of the statute of frauds requiring promises to answer for the debts of another to be in writing in order to be enforceable. The Court below held for the plaintiff. On writ of error.

Point Involved: Whether a *del credere* commission is an undertaking establishing a principal liability on the factor or making him surety, or guarantor for the customers.

PORTER, SENATOR: "This writ of error seems to have been brought to determine whether the agreement of a factor to guarantee the sales made by him is a contract within the statute of frauds, requiring an agreement in writing to prove its existence. This necessarily involves an inquiry into the nature of the contract which the factor makes in such a case. The plaintiff insists that one acting under a *del credere* commission is a guarantor or surety for the debt which the purchaser of the goods contracts; while the defendants, on the other hand, maintain that the factor contracts an original, absolute obligation to pay the principal the amount of the sales, at the expiration of the term of credit. * * *"

[Here the Court reviews English authorities prior to the year 1816, showing that they hold that the undertaking of the factor is an absolute direct undertaking whereby he places himself in the stead of the debtor.]

“* * * Chancellor Kent, in the first edition of his commentaries, published in 1826, states his view at that time of the law on this point as follows: ‘When a factor acts under a *del credere* commission for an additional premium, he becomes liable to his principal when the purchase money falls due; for he is substituted for the purchaser, and is bound to pay, not conditionally, but absolutely and in the first instance.’ 2 Kent’s Com., 1st ed., 487. The principal is stated in the same way in 2 Chit. Com., L. 220, 221.

“* * * The understanding of the mercantile community has, I apprehend, been general and uniform, that the agreement between the principal and factor was original and absolute to pay the price of the sale, deducting the commission, at the time the credit expired. Doubtless the factor expected the fund would be received from the purchaser; but whether received or not, he charges himself with the amount in his account with his principal. A contrary rule would require the principal to exhaust his remedy against the purchaser in order to determine his insolvency, before he could charge the factor as surety.

“* * *”

Question 192: Who is a *del credere* agent? Is his undertaking within the statute of frauds? If the debtor obtained through his agency does not pay, must the principal seek first to charge the debtor before he can charge the agent *del credere*?

(Note: In *Balderson v. National Rubber Co.*, 18 R. I. 388, the Court quotes from *Edwards on Bailments*, Sec. 278, note, as follows, to show that a *del credere* agent, is in all respects an agent and not a purchaser, differing from ordinary agents merely in his undertaking to see that the debts contracted through his agency are paid:

“* * * The effect of a commission *del credere* is, in several particulars, to place the factor in new relation as to his principal. It is true he is the debtor, but the principal still retains the right, at any time before payment, to resort to the

purchaser as collateral security. It is a rule for the protection of the principal. A general factor may wait to receive instruction as to the mode of remitting the net proceeds, and is not liable to an action until a default on his part in remitting or paying the proceeds according to the orders of his principal: *Ferris v. Paris*, 10 Johns. 285. The only difference between a factor acting under a *del credere* commission or without one is as to the sales made. In the former case he is absolutely liable and may correctly be said to become the debtor of his principal; but it is not strictly correct to say that he is placed in the same situation as if he had become the purchaser himself; for, as we have seen, the principal, notwithstanding this liability, may exercise a control not allowable between creditor and debtor. When the principal appears, the right of the factor to receive payment ceases. The effect of the commission is not to extinguish the relation between principal and factor, but applies solely to a guaranty that the purchaser shall pay. The liability is not contingent, so as to require legal measures to be exhausted against the purchaser before the factor is bound, but an engagement to pay on the day the purchase money becomes due. Although the factor is absolutely liable, he is not bound to pay until the money becomes due from the purchaser. Subject to the limitations above mentioned, the factor, under a commission, becomes a debtor to his principal.")

CHAPTER TWENTY-FOUR

THE RIGHT OF THE AGENT TO COMPENSATION AND DAMAGES

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| § 153. As governed by express agreement. | § 156. Agent's rights upon his wrongful discharge. |
| § 154. When agreement implied. | § 157. Agent's rights upon his right-ful discharge. |
| § 155. When right of compensation accrues upon performance. | |

Sec. 153. As Governed by Express Agreement.

Case No. 193. Huber Mfg. Co. v. Watson, 19 Ky. L. R. 864.

Facts: Suit to recover certain commissions alleged to have been earned by Watson as agent for Huber Mfg. Co. in selling threshing machines and engines. Watson was employed under a written contract which gave him a certain commission, payable as payments were made, except it was provided "no commission to be allowed or paid * * * on sale of goods where foreclosure proceedings at any time become necessary." Watson made a sale of certain engines to Gallagher Bros. and a mortgage was taken to secure the purchase price. This mortgage was foreclosed. The present suit is upon certificates which were issued to Watson when the sale was made, payable to Watson upon the same dates that the installments on the engine fell due.

PAYNTER, J.: " * * * The only question in this case is whether or not Watson is bound by the contract which he made with his principal. It is written in unmistak-

able terms that he is not to be paid a commission for his services if it becomes necessary for the company to institute foreclosure proceedings. Whether it was a wise contract for him to make is not for us to determine. He was charged with the responsibility of determining that question for himself before it was executed. The company knew that proceedings to enforce its lien in the courts were necessarily expensive. * * * The company wanted him (the agent) to make sales to solvent persons, and those who would pay it without the necessity of instituting legal proceedings to enforce payment. The provision in question was to the advantage of the company in that it made the agent careful as to whom he made sales. When the agent agreed to accept the compensation provided for in the contract he took the risk that his right to it would fail if foreclosure proceedings became necessary."

Sec. 154. When the Agreement Implied.

See *Hertzog v. Hertzog*, Case No. 116, *supra*.

Sec. 155. When Right of Compensation Accrues upon Performance.

Case No. 194. *Fox v. Ryan*, 240 Ill. 391.

Facts: Fox sues to recover \$4,000 as commissions claimed to have been earned by him as agent in selling Ryan's mining stock. Ryan procured a purchaser who entered into a contract, but the contract was never carried out by the purchaser.

Point Involved: Whether a broker to sell who procures a purchaser who is accepted by and enters into a contract with the seller, is entitled to his commission if the purchaser refuses to perform the contract.

MR. CHIEF JUSTICE FARMER: " * * * The second proposition asked by the appellant was, that merely procuring a person to enter into a contract for the purchase of property does not entitle a broker to commissions

unless such person was ready, willing and able to make the payments, including deferred payments, named in the contract. The Court modified this proposition by adding, 'unless the defendant accepted the purchaser.' The proposition as modified was correct. Where a broker is employed to sell property by the owner, if he produces a purchaser within the time limited by his authority who is ready, willing and able to purchase the property upon the terms imposed by the seller he is entitled to his commissions, even though the seller refuses to perform the contract on his part. In such case, however, it is necessary for the broker to prove the readiness, willingness and ability of the purchaser to take the property on the terms proposed. But where the seller accepts the purchaser and enters into a valid contract of sale with him, the broker's commission is earned whether the purchaser subsequently fails to perform his contract and make the payments agreed upon or not. There are cases in other States holding otherwise, but in *Wilson v. Mason*, 158 Ill. 304, this Court refused to follow those cases, denominating them as extreme and exceptional, and said, on page 311: 'The true rule is, that the broker is entitled to his commissions if the purchaser presented by him and the vendor, his employer, enter into a valid, binding and enforceable contract. If after the making of such a contract, even though executory in form, the purchaser declines to complete the sale and the seller refuses to compel performance, the broker ought not to be deprived of his commissions. He has done all that he can do when he produces a party who is able, and in binding form offers, to purchase upon the proposed terms. An agreement by a real estate broker to procure a purchaser not only implies that the purchaser shall be one able to comply, but that the seller and the purchaser must be bound to each other in a valid contract. So where the agreement of the real estate broker is to make a sale, his commission is earned when a contract is entered into which is mutually obligatory upon the vendor and vendee, even though the

vendee afterwards refuses to execute his part of the contract of sale or purchase."

Question 194: (1.) A authorizes B, a real estate broker, to sell his property on certain specified terms. B procures C, but A refuses to deal with C. On what conditions, if any, can B compel A to pay him a commission?

(2.) A authorizes B, a real estate broker, to sell his property on certain specified terms. B procures C, with whom A makes a contract of sale. C is, however, financially irresponsible and fails to perform his contract. Is B entitled to his commissions?

(3.) A advises B, a broker, that he wants to sell his home and directs C to procure him a buyer. No terms are, however, proposed, as A wants to bargain with the prospective buyers. B procures C, who offers A a good price but A refuses to sell to him. C is ready, willing and able to buy at a good market price. Is B entitled to his commission?

(4.) Suppose in the case last stated A had accepted C and made terms with him and entered into a contract. Would B be entitled to his commissions?

Sec. 156. Agent's Rights upon His Wrongful Discharge.

Case No. 195. Doherty v. Shipper & Block, 250 Ill. 128.

Facts: E. Doherty was employed by defendant, for a period of eighteen weeks at \$25.00 per week, payable weekly. At the end of the 9th week she was discharged without cause (as she claimed). At the end of the following week she brought suit before a Justice of the Peace for her week's wages and recovered a judgment for \$25.00. This judgment was paid. She now sues at the end of the entire term for the eight additional weeks covered by her contract. Defendant contends that the suit before the justice, bars her right to prosecute any subsequent suit.

Point Involved: Whether an employee discharged wrongfully from his employment can bring repeated suits for his installments of salary as they would have fallen due had the employment continued. Whether upon any theory a discharged employee may have more than one action for his discharge.

MR. JUSTICE HAND: "The sole question raised in this Court and argued in the briefs filed by the respective parties is, was the first judgment rendered by the justice of peace a bar to this action?

"It is well settled that in case an employee is discharged without cause before the term of his employment has expired and he has been paid in full up to the time when he is discharged, he may treat the contract of hiring as continuing and bring an action for a breach of the contract of employment against his employer for discharging him, and if the suit is not commenced, or if commenced before but not tried, until his term of employment has expired, he may recover the contract price of his wages, less what he has earned or by reasonable diligence could have earned in other employment subsequent to his discharge. (*Mount Hope Cemetery Ass'n v. Weidenmann*, 139 Ill. 67.) There is a class of cases which holds this remedy is not exclusive, but that, in addition to such remedy, the employee, where his wages by the terms of the contract, are payable in installments, may bring an action for each installment of wages as it falls due, subsequent to his wrongful discharge, and that the recovery on one installment is not a bar to the recovery on subsequently accruing installments. (*Gandell v. Pontigny*, 4 Camp. 375.) The recovery for each installment of wages allowed in the class of cases referred to, as it falls due, is based upon the theory of constructive service, and while the right of a recovery was thus permitted for a time in England and in the courts of some of the States in the Union, that theory of recovery has been abandoned in England, (*Archard v. Horner*, 3 C. & P. 349; *Smith v. Hayward*, 7 Ald. & Ell. 544; *Fewings v. Tisdal*, 1 Exch. 295;) and quite generally in this country. *James v. Allen County*, 44 Ohio St. 226; *Howard v. Daly*, 61 N. Y. 362; *Richardson v. Eagle Machine Works*, 78 Ind. 422; *Olmstead v. Bach & Son*, (Md.) 22 L. R. A. 74.

"* * * We have examined the numerous cases bearing upon the subject which have been cited in the

briefs, and are of the opinion that upon principle the only action which logically can be maintained, upon the facts of this case, against the appellee, is an action for the breach of the contract of employment growing out of the wrongful discharge of the appellant, and that all damages resulting from such breach must be recovered in one action, and that after one recovery has been had that recovery is a bar to all future actions based upon the contract of employment or growing out of the relation of employer and employee by reason of the wrongful discharge of the appellant.

“We think the doctrine of constructive service, as applied to a case like this and where used as a basis of recovery, is illogical and unsound. The court has universally held that the proper measure of damages in a case like this is the contract price, less what the employee earned or could have earned. That being so, if the discharged employee can find employment it is his duty to accept it. How can it then be said that while he is performing service for another person he is constructively engaged in the employ of the employer by whom he was discharged? * * * We therefore conclude that the judgment recovered before the justice of the peace was a complete bar to the subsequent action.”

Question 195: (1.) State the facts, the question presented and the Court's decision in the above case.

(2.) What is the theory of constructive service? What are the objections to that theory?

(3.) State the remedies which, according to this case, a discharged employee may elect between to recover his salary or his damages.

(4.) What is the difference in principle, between this case and successive suits for monthly rentals falling due upon premises wrongfully abandoned by tenant?

(Note: As to the duty of the employee to reduce damages, see case No. 154, *supra*.)

Sec. 157. Agent's Rights upon His Rightful Discharge.

(Note: See the cases of *Stark v. Parker* and *Britton v. Turner*, Cases Nos. 158 and 159, *supra*.)

PART VII

THE RIGHTS AND OBLIGATIONS OF THIRD PERSONS GROWING OUT OF THE AGENCY

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|-----------------------|---|
| Chapter Twenty-five. | Rights of Third Persons
Against the Agent. |
| Chapter Twenty-six. | Rights of Third Persons in
Contract Against a Disclosed
Principal. |
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| Chapter Twenty-eight. | Knowledge of Agent as Knowl-
edge of Principal. |
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(or Master) to Third Person
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ant). |
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CHAPTER TWENTY-FIVE

RIGHTS OF THIRD PERSONS AGAINST THE AGENT

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| § 158. General rule. | § 161. Agent's assumption of liability by the form of his contract. |
| § 159. When agent bound because he lacks authority. | § 162. Agent's liability in tort. |
| § 160. Agent's liability when principal undisclosed. | |

Sec. 158. The General Rule.

(Note: The general rule may be simply and briefly stated: if the agent discloses his principal and acts as the representative of such principal, and within his authority the principal is bound and the agent is not.)

Sec. 159. When Agent Personally Bound Because He Lacks Authority.

Case No. 196. Thilmany v. Iowa Paper Bag Co. and Wm. Daggett, 108 Iowa, 357.

Facts: Suit by Thilmany to recover the purchase price of a carload of paper shipped to the Iowa Paper Bag Co. The paper was shipped under a contract of purchase by the Bag Company, and a guaranty of payment signed "Iowa National Bank, by William Daggett, V. P." It is sought to hold Daggett on the theory that he exceeded his authority, the bank having no power under its charter to make such a contract.

Point Involved: Whether an agent is responsible on a contract made by him in excess of his actual or ap-

parent authority; limitations on the doctrine. Specifically, whether an agent who seeks to bind a corporation on a contract it has no power under its charter to make, is personally liable.

DEEMER, J.: "Plaintiff claims that defendant Daggett is liable on the written guaranty for two reasons: First, because it is his individual contract, was intended to bind him as well as the bank, and was so received and acted upon by appellant; second, for the reason that, if he intended said guaranty or letter of credit to be the obligation of the bank only, he was acting beyond the scope of his authority as vice-president of the bank, and failing to bind the bank, is himself liable; as an agent who attempts to bind his principal by a contract he had no authority as such agent to make.

“* * *

“As to the second proposition, the rule has been broadly stated over and over again that when an agent contracts in excess of his authority, or acts without authority, or assumes to have authority when he has none, or for any reason fails to bind his principal, he is himself bound. *Winter v. Hite*, 3 Iowa, 142; *Allen v. Pegram*, 16 Iowa, 163; *Andrews v. Tedford*, 37 Iowa, 314; *Lewis v. Tilton*, 64 Iowa, 220. That this is the general rule must be conceded, and, as applied to the facts of the cited cases, it is correct. But like nearly every other general rule, it is subject to exceptions, some of which we will notice. The reasons generally given for the rule are: First. That, as the agent assumes to represent a principal, he cannot be heard to say that he had no authority, or that there was in fact no principal to be bound; for, if he assumes to represent another, he impliedly warrants that there is such another, and that he has authority to represent him. If, then, there is no principal, or the agent has no authority to act for him, an action will lie for deceit or misrepresentation. Second. The law assumes that the contract was intended to bind someone, and, if the principal is not bound, the contract

must be that of the agent. This last rule is generally applied to executed contracts. In such cases action will lie for benefits received by the agent. Some cases go to the extent of rejecting all parts of the contract relating to the obligation of the principal, and then treat it as the personal contract of the agent. As illustrating this rule, see *Byars v. Doors*, 20 Mo. 284; *Woodes v. Dennett*, 9 N. H. 55; *Twerilliger v. Murphy*, 104 Ind. 32 (3 N. E. Rep. 404). A third reason for the rule is that the agent impliedly warrants his authority to act for his principal, and if he has no such power, an action lies for breach of warranty. Now, it is apparent, that if the party with whom the agent contracts has notice of the facts relating to the authority of the agent, and is as fully advised as to his authority as the agent himself, there can be no action for deceit. And so the text writers have generally stated this as an exception to the general rule. *Mechem on Agency*, at sections 545 and 546, thus states the law: 'Sec. 545. * * * Of course if the other party knew, or by the exercise of reasonable care might have discovered, the want of authority, he cannot recover. This implied warranty by the agent of his authority must ordinarily be limited to its existence as a matter of fact, and not be held to include a warranty of its adequacy or sufficiency in point of law.' 'Sec. 546. Where Agent Discloses All the Facts Relating to His Authority. Where, however, the agent, acting in good faith, fully discloses to the other party at the time all the facts and circumstances touching the authority under which he assumes to act, so that the other party from such information or otherwise, is fully informed as to the existence and extent of his authority, he cannot be held liable. It is material, in these cases, that the party claiming a want of authority in the agent should be ignorant of the truth touching the agency. If he has full knowledge of the facts, or of such facts as are sufficient to put him upon inquiry, and he fails to avail himself of such knowledge, or of the means of knowledge reasonably accessible to him, he cannot say that

he was misled, simply on the ground that the other assumed to act as agent without authority. Of course, if the agent conceals or misrepresents material facts, to the detriment of the other party, he cannot claim exemption.' Judge Story, in his valuable work on Agency, (section 265) says: 'This doctrine, however, as to the liability of the agent, where he contracts in the name and for the benefit of the principal, without having due authority, is founded upon the supposition that the want of authority is unknown to the other party, or if known, that the agent undertakes to guaranty a ratification of the act by the principal. But circumstances may arise in which the agent would not or might not be held to be personally liable, if he acted without authority, if that want of authority was known to both parties or unknown to both parties.' Abundant authorities are cited by each author in support of these propositions. The same thought is equally applicable to the third reason above given for the general rule. And it may be further said that the implied warranty of the agent does not relate to the power of the principal to enter into the particular contract. He simply covenants that he has authority to act for his principal, not that the act of the principal is legal and binding. Hence it has been justly said that the contract must be one which the law would enforce against the principal, if it had been authorized by him, else the anomaly would exist of giving a right of action against an assumed agent for an unauthorized representation of his power to make the contract, when a breach of the contract itself, if it had been authorized, would have furnished no ground of action against the principal. * * *"

[The court decides that on neither of the grounds contended for, is Daggett liable.]

Question 196: (1.) State the facts in this case, the specific question presented and the Court's decision.

(2.) State in your own words the rule as to the liability of an agent to a third person when that third person cannot hold the principal because of lack of real or apparent authority. On what reasons is the agent so held?

(3.) Why is the plaintiff in this case chargeable with notice that Daggett had no authority to bind the bank?

Sec. 160. Agent's Liability When Principal Undisclosed.

Case No. 197. Wheeler v. Reed, 36 Ill. 81.

Facts: Suit by Reed and others against Wheeler to recover damages arising out of an alleged breach of warranty in a sale of flour by Wheeler. Among other defenses, Wheeler contended that he was not representing himself but a principal. Plaintiffs testify that no principal was named or known at the time, though it was known he was a broker. The transactions were oral.

Point Involved: The liability of an agent as principal where he does not disclose his principal.

BREESE, J. “* * *.”

“The next question raised by the appellant is, whether the defendant made the warranty to bind himself, or on behalf of a principal.

“We admit the rule to be as stated, where an agent makes a contract and discloses at the same time his principal, or the principal was known at the time by the other party, the agent is not personally liable unless he makes himself so, expressly; or it may be fairly inferred from the nature of the contract itself and concurring circumstances. These are facts for the consideration of the jury, and they have found there was no agency in this sale. The account rendered shows the sale was made by the defendant as principal. Nor does the proof show that the broker, when he purchased, knew the principal. He traded with the defendant as the principal, and so the account of sales was made out and the receipt of payment made.

“It would seem to us, this proof would enable the defendant to recover in his own name, against the plaintiffs, had they failed to pay for the flour on delivery. This is some test of the right of the plaintiffs to recover against him, for a breach of his contract of warranty.

"The witness stated that the defendant did not disclose his agency; he supposed he was selling on commission; did not know, when he bought, that one Burrows was the proprietor of the flour, but supposed so; that defendant had advanced upon it, and that Burrows was running the mill.

"The rule is, that a vendor not disclosing his agency, may be treated as a principal. This was held in *Mills v. Hunt*, 20 Wend. 433, and is a settled rule. In that case, the sale of the several articles was made by Mills, Brothers & Co., and the bill of parcels made out in their copartnership name, without disclosing the fact they were acting as the agents of other parties. They were auctioneers, and that fact was held not to be sufficient notice to the purchasers that they were not selling their own goods. The law was considered by the court of errors, in that case, as well settled, that a vendor or purchaser, dealing in his own name, without disclosing the name of his principal, is personally bound by his contract; and it makes no difference that he is known to the other party to be an auctioneer or broker, who is usually employed in selling property as the agent for others. And the court further held, even when he discloses the name of his principal, if he signs a written contract in his own name merely, which does not show upon its face that he was acting as the agent of another, or in an official capacity in behalf of the government, he will be personally bound thereby. This rule has not been modified or changed by any decision of this court. The case in 2nd Gilm. 371, *Chase v. Debolt*, was a case where the agency was disclosed at the time of the contract. The plaintiff knew that he was working for Bishop Chase, and not for the defendant. The case of *Warren v. Dickson*, 27 Ill. 118, holds merely, that where the fact of agency is known, it is not necessary to disclose it. The case of *Marckle v. Haskins*, ib. 382, decides only, if one bargains with an agent, knowing him to be such, and the principal has recognized the transaction, a warranty by the agent is a warranty of the principal, and he is the proper party to be sued for a breach.

"The case of *Seery v. Socks, et al.*, 29 Ill. 313, decides merely, when a person professing to act as an agent discloses the name of his principal, he assumes no personal responsibility unless he acts fraudulently. These cases do not militate against the rule laid down in 20th Wendell. It is a settled rule in verbal contracts, if the agent does not disclose his agency and name his principal, he binds himself and becomes subject to all liabilities, express and implied, created by the contract and transaction, in the same manner as if he were the principal in interest. *Davenport et al. v. O'Riley et al.*, 2 McCord, 198; *Allen et al. v. Rostain*, 11 Serg. & Rawle, 362, 375; *Mauri v. Hefferman*, 13 Johns. 58, 77. And the fact that the agent is known to be a commission merchant, auctioneer, or other professional agent, makes no difference. *Waring v. Mason*, 18 Wend. 426; *Hastings v. Lovering*, 2 Pick. 214; and the case in 20th Wend. 431, *Mills v. Hunt*, which we have already cited."

"* * *"

Question 197: (1.) What were the facts, the question presented and the Court's decision in this case?

(2.) Even though the principal is known, how, as suggested by the Court, might the agent bind himself?

(Note: If the third person on discovering the principal elects to hold him, the agent's liability ceases. For further treatment of the law of undisclosed principals, see Chapter 27, *post*. See also the next section for the liability of the agent on written contracts where the principal is *known* but not properly named in a written contract.)

Sec. 161. Agent's Assumption of Liability by the Form of His Contract.

Case No. 198. *Casco National Bank v. Clark*, 139 N. Y. 307.

Facts: The facts are stated in the opinion.

Point Involved: In what form an agent should execute a negotiable instrument of his principal in order not to

bind himself personally. Whether the instrument set out in this case binds the principal or the agent.

GRAY, J.: "The action is upon a promissory note in the following form, viz.:

RIDGEWOOD
ICE
COMPANY

Brooklyn, N. Y., Aug. 2, 1890.
\$7,500. Three months after date,
we promise to pay to the order of
Clark & Chaplin Ice Company,
seventy-five hundred dollars at Me-
chanics Bank; value received.

E. H. CLOSE, Treas.

JOHN CLARK, Prest."

"It was delivered in payment for ice sold by the payee company to the Ridgewood Ice Company, under a contract between those companies, and was discounted by the plaintiff for the payee, before its maturity. The appellants, Clark and Close, appearing as makers upon the note, the one describing himself as 'Prest.' and the other as 'Treas.,' were made individually defendants. They defended on the ground that they made the note as officers of the Ridgewood Ice Company and did not become personally liable thereby for the debt represented.

"Where a negotiable promissory note has been given for the payment of a debt contracted by a corporation, and the language of the promise does not disclose the corporate obligation, and the signatures to the paper are in the names of individuals, a holder, taking *bona fide* and without notice of the circumstances of its making, is entitled to hold the note as the personal undertaking of its signers, notwithstanding they affix to their names the title of an office. Such an affix will be regarded as descriptive of the persons and not of the character of the liability. Unless the promise purports to be by the corporation, it is that of the persons who subscribe to it; and the fact of adding to their names an abbreviation of some official title has no legal signification as qualifying their obligation, and imposes no obligation upon the cor-

poration whose officers they may be. This must be regarded as the long and well-settled rule (Byles on Bills, Sec. 36, 37, 71; *Pentz v. Stanton*, 10 Wend. 271; *Taft v. Brewster*, 9 Johns. 334; *Hills v. Bannister*, 8 Cow. 31; *Moss v. Livingston*, 4 N. Y. 208; *De Witt v. Walton*, 9 id. 571; *Bottomley v. Fisher*, 1 Hurlst. & Colt. 211). It is founded in the general principle that in a contract every material thing must be definitely expressed, and not left to conjecture. Unless the language creates, or fairly implies, the undertaking of the corporation, if the purpose is equivocal, the obligation is that of its apparent makers.

“It was said in *Briggs v. Partridge*, 64 N. Y. 357, 363, that persons taking negotiable instruments are presumed to take them on the credit of the parties whose names appear upon them, and a person not a party cannot be charged, upon proof that the ostensible party signed, or indorsed, as his agent. It may be perfectly true, if there is proof that the holder of negotiable paper was aware, when he received it, of the facts and circumstances connected with its making, and knew that it was intended and delivered as a corporate obligation only, that the persons signing it in this manner could not be held individually liable. Such knowledge might be imputable from the language of the paper in connection with other circumstances; as in the case of *Mott v. Hicks*, 1 Cowen, 513, where the note read, ‘the president and directors promise to pay,’ and was subscribed by the defendant as ‘president.’ The Court held that that was sufficient to distinguish the case from *Taft v. Brewster*, *supra*, and made it evident that no personal engagement was entered into or intended. Much stress was placed in that case upon the proof that the plaintiff was intimately acquainted with the transaction out of which arose the giving of the corporate obligation.

“In the case of the *Bank of Genesee v. Patchin Bank*, 19 N. Y. 312, referred to by the appellant’s counsel, the action was against the defendant to hold it as the indorser of a bill of exchange, drawn to the order of ‘S. B. Stokes, Cas.,’ and indorsed in the same words. The plaintiff

bank was advised, at the time of discounting the bill, by the president of the Patchin Bank, that Stokes was its cashier, and that he had been directed to send it in for discount, and Stokes forwarded it in an official way to the plaintiff. It was held that the Patchin Bank was liable, because the agency of the cashier in the matter was communicated to the knowledge of the plaintiff as well as apparent.

“Incidentally, it was said that the same strictness is not required in the execution of commercial paper as between banks, that is in other respects, between individuals.

“In the absence of competent evidence showing or charging knowledge in the holder of negotiable paper as to the character of the obligation, the established and safe rule must be regarded to be that it is the agreement of its ostensible maker and not of some other party, neither disclosed by the language, nor in the manner of execution. In this case the language is ‘we promise to pay,’ and the signatures by the defendants Clark and Close are perfectly consistent with an assumption by them of the company’s debt.

“The appearance upon the margin of the paper of the printed name ‘Ridgewood Ice Company’ was not a fact carrying any presumption that the note was, or was intended to be, one by that company.

“It was competent for its officers to obligate themselves personally, for any reason satisfactory to themselves, and, apparently to the world, they did so in the language of the note; which the mere use of a blank form of note, having upon its margin the name of their company, was insufficient to negative. * * *”

Question 198: (1.) Redraft the note in the above case so that there would be no question that the corporation was liable and that the president and treasurer were not liable.

(2.) Was the plaintiff in the above case the payee or a purchaser from the payee? Might that make a difference? Do you think it would necessarily make a difference?

Case No. 199. Barlow v. Cong. Soc., 90 Mass. 460.

Facts: Contract brought by the administrator of the estate of Reuben Barlow against the Congregational Society in Lee, upon the following promissory note:

"\$23.00. Lee, April 26, 1858. On demand I as treasurer of the Congregational Society, or my successors in office, promise to pay Erastus Hall or order twenty-three dollars, value received, with interest. Samuel S. Rogers, Treasurer."

The declaration alleged that the defendants, for value received by them, made the note by Samuel S. Rogers, their treasurer and agent, duly authorized; and that it was duly indorsed to the plaintiff's intestate. The defendants filed a general demurrer, which was overruled in the superior court, and judgment rendered for the plaintiff; and the defendants appealed to this court.

Point Involved: In what form an agent should execute a negotiable instrument of his principal in order to bind said principal. Whether the instrument set out in the above facts binds the principal or the agent.

GRAY, J.: "It is well settled in this commonwealth that the question whether a principal or his agent is the party liable upon a negotiable note or bill of exchange must be ascertained from the instrument itself, at least when both are in law capable of contracting and it is not pretended that either has adopted the name of the other as his own for the purpose of transacting business. This exception to the general rule which governs other parol (or unsealed) agreements is derived from the nature of negotiable paper, which, being made for the very purpose of being transferred from hand to hand, and of giving to every successive holder as strong a claim upon the maker as the original payee had, must indicate on its face who the maker is; for any additional liability of the principal, not expressed in the form of such a note or bill, would not be negotiable; and any ambiguity arising upon the face of the writing in determining whether it is the promise of the principal or of the agent, must, on

the ordinary principles of the law of evidence, be solved without the aid of extrinsic testimony.

“* * * It has indeed been adjudged by the supreme court of the United States, as well as by this court, that on commercial paper payable to ‘A. B., cashier,’ the bank, although not named in the instrument, might maintain an action. * * * Whether those decisions stand upon the peculiar relation between a bank and its cashier, or (as the opinions imply) upon a general right of any principal to sue upon negotiable paper made to his agent, we need not here inquire.

“* * *

“All the decisions of this court upon unsealed instruments since the case of *Mann v. Chandler* have required something more than a mere description of the general relation between the agent and the principal, in order to make them the contracts of the latter. Thus an agreement which declares the signers to be a committee of a certain town, or trustees of a particular meeting-house, and is signed with their own names, without addition, is their individual contract. * * * So a promissory note, in the body of which the principal is not named, and which is signed by the agent in his own name, does not, by the mere addition to his signature of the words, ‘trustee’ or ‘president’ of a particular railroad corporation, become the note of the corporation.

“* * *

“Upon the question what words in a simple contract, made by the hand of an agent of an individual or a private corporation, will bind the principal, the line of distinction between the cases, even in the same court, is very narrow. Thus it is well settled that a promissory note made by an agent, without naming his principal in the body of it but signed ‘For C. D., A. B.,’ or ‘A. B., agent for C. D.,’ or ‘A. B., for C. D.’ is the note of C. D. the principal. * * * But it seems to be equally well settled in this court, and supported by English authority, that the mere insertion of ‘for,’ or ‘for and in behalf of’ the principal, in the body of the note, does not make it the

contract of the principal, if signed by the mere name of the agent, without addition. * * * So a direction in a bill of exchange drawn by an agent to place the amount 'to the account' of his principal, has been held not to exempt an agent, signing his own name without addition,

* * *

“ * * *

“The case now before the Court is stronger against the principal than any of these. The note is dated at Lee, and calls the person who affixes the signature ‘treasurer of the Congregational Society,’ thus distinctly naming the Congregational Society in Lee, and showing who the principal is; the promise contained in the note is expressed to be made by the writer ‘as treasurer of’ that society; it does not promise a payment by the present treasurer at all events, but by him ‘or his successors in office,’ which could not be if the note were merely his personal act, and not the act of the corporation whose agent he was; and the designation of his office is repeated after his signature. In short, the note not only names the principal, describes the relation between the principal and agent, and declares the note to be made in execution of the agency, but it cannot take effect according to its terms, except as the note of the principal.”

Question 199: (1.) State how the note in this case read, how it was signed, and whether the Court held the agent liable.

(2.) What form of description of the principal in the body of this note, and form of signature would have avoided all question as to whether the principal and not the agent was liable on this note? Redraft the note and signature in conventional form showing that the trustee signed beyond a doubt merely as agent.

Case No. 200. Higgins v. Senior, 8 M. & W. 834.

Facts: The facts are stated in the opinion.

Point Involved: Whether an agent representing a dis-

closed principal, who executes a simple contract solely in his own name, can show by parol evidence, that it was not intended to bind him, the agent.

PARKE, B.: "The question in this case, which was argued before us in the course of the last term, may be stated to be, whether in an action on an agreement in writing, purporting on the face of it to be made by the defendant, and subscribed by him, for the sale and delivery by him of goods above the value of £10, it is competent for the defendant to discharge himself, on an issue on the plea of *non assumpsit*, by proving that the agreement was really made by him by the authority of and as agent for a third person, and that the plaintiff knew those facts, at the time when the agreement was made and signed. Upon consideration, we think that it was not: and that the rule for a new trial must be discharged.

"There is no doubt, that where such an agreement is made, it is competent to show that one or both of the contracting parties were agents for other persons, and acted as such agents in making the contract, so as to give the benefit of the contract on the one hand to, and charge with liability on the other, the unnamed principals: and this, whether the agreement be or be not required to be in writing by the Statute of Frauds: and this evidence in no way contradicts the written agreement. It does not deny that it is binding on those whom, on the face of it, purports to bind; but shows that it also binds another, by reason that the act of the agent, in signing the agreement, in pursuance of his authority, is in law the act of the principal.

"But, on the other hand, to allow evidence to be given that the party who appears on the face of the instrument to be personally a contracting party, is not such, would be to allow parol evidence to contradict the written agreement; which cannot be done. And this view of the law accords with the decisions, not merely as to bills of exchange signed by a person, without stating his agency on the face of the bill; but as to other written

contracts, namely, the cases of *Jones v. Littledale*, 6 Ad. & Ell. 486; 1 Nev. & A. 677, and *Magee v. Atkinson*, 2 M. & W. 440. It is true that the case of *Jones v. Littledale* might be supported on the ground that the agent really intended to contract as principal: but Lord Denman, in delivering the judgment of the Court lays down this as a general proposition, 'that if the agent contracts in such a form as to make himself personally responsible, he cannot afterwards, whether his principal were or were not known at the time of the contract, relieve himself from that responsibility.' And this is also laid down in *Story on Agency*, § 269. *Magee v. Atkinson* is a direct authority, and cannot be distinguished from this case."

Question 200: State the doctrine of this case.

Sec. 162. Agent's Liability in Tort.

Case No. 201. *Baird v. Shipman*, 132 Ill. 16.

Facts: The facts are given in the opinion.

Point Involved: The liability of the agent for his own torts in connection with the agency.

This court adopts the opinion of the Appellate Court, as follows:

GARNETT, P. J.: "This is an appeal from a judgment for damages, founded on the alleged negligence of appellants, by which the death of Joseph Garnett, appellee's intestate, is said to have been caused. The place where the injury happened was in a barn situated on premises on Michigan Avenue, in Chicago, belonging to Aaron C. Goodman, who was then, and for several years before, a resident of Hartford, Connecticut. Appellants were his agents for renting the premises during the years 1884 and 1885, and during both years were carrying on the real estate business in Chicago. On the trial evidence was given tending to show that they had, in fact, complete control of the premises, with the residence and barn thereon, repairing the same in their discretion, and

there was no proof that in such matters they received any directions from the owner. The property was rented by appellants to Emma R. Wheeler and A. R. Tillman from April 1, 1884, to April 30, 1885, and to Emma R. Wheeler from May 1, 1885, to April 30, 1886. Both leases were in writing, and by the terms of each lease the tenants covenanted to keep the premises in good repair. The tenant in the last lease rented the premises to Nellie E. Pierce, who occupied the same from April 28, to September, 1885. The evidence tends to prove that when the lease was made to Emma R. Wheeler, the large carriage door to the barn was in a very insecure condition, and that appellants, through one Warner, the manager of their renting department, verbally agreed with Mrs. Wheeler to put the premises in thorough repair. Nothing was done to improve the condition of the door, and on June 12, 1885, while the deceased, an expressman by occupation, was engaged in delivering a load of kindling in the barn, for one of the parties living in the house, the door, weighing about four hundred pounds, fell from its fastenings, and injured him to such an extent that he died the following day.

“Appellants make two points: First, that the verdict is clearly against the weight of the evidence; second, that they were the agents of the owner, Goodman, and liable to him, only, for any negligence attributable to them.

“There is nothing more than the ordinary conflict of evidence found in such cases, presenting a question of fact for the jury, and the finding must be respected by this court in deference to the well settled rule.

“The other point is not so easily disposed of. An agent is liable to his principal only for mere breach of his contract with the principal. He must have due regard to the rights and safety of third persons. He can not, in all cases, find shelter behind his principal. If, in the course of his agency, he is entrusted with the operation of a dangerous machine, to guard himself from personal liability he must use proper care in its management and supervision, so that others in the use of ordinary care

will not suffer in life, limb or property. (Suydam v. Moore, 8 Barb. 358; Phelps v. Wait, 30 N. Y. 78.) It is also his contract with the principal which exposes him to or protects him from liability to third persons, but his common law obligation to so use that which he controls as not to injure another. That obligation is neither increased nor diminished by his entrance upon the duties of agency, nor can its breach be excused by the plea that his principal is chargeable. Delaney v. Rochereau, 34 La. Ann. 1123.

“If the agent once actually undertakes and enters upon the execution of a particular work, it is his duty to use reasonable care in the manner of executing it, so as not to cause any injury to third persons which may be the natural consequences of his acts, and he can not, by abandoning its execution midway, and leaving things in a dangerous condition, by reason of his having so left them without proper safeguards. Osborne v. Morgan, 130 Mass. 102.”

Question 201: (1.) State the facts, the question presented and the Court's decision in the above case.

(2.) A has a house in a tumble down condition. He contracts with B to repair it. B never enters upon the performance of the contract. C being rightfully on the premises is injured by falling through a rotten plank. Is B liable?

(3.) In the case of Singer Mfg. Co. v. Rahn, Case No. 162 *supra*, would the agent have been liable had he been sued for the tort of negligently driving the wagon to the plaintiff's damage?

CHAPTER TWENTY-SIX

RIGHTS OF THIRD PERSONS IN CONTRACT AGAINST A DISCLOSED PRINCIPAL

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|---|---|
| § 163. In general. | § 168. Implied or apparent powers of agents: to receive payment. |
| § 164. The authority is determined by the apparent scope of the appointment. | § 169. Implied or apparent powers of agents: to extend credit on sales. |
| § 165. Implied or apparent powers of agents: to borrow money. | § 170. Implied or apparent powers of agents: to warrant goods sold. |
| § 166. Implied or apparent powers of agents: to make or endorse commercial paper. | |
| § 167. Implied or apparent powers of agents: to sell personal property. | |

Sec. 163. In General.

Case No. 202. Law v. Stokes, 3 Vroom (N. J.) 249.

Facts: Suit brought to recover the amount of a bill of goods sold by plaintiff to defendant. Defense: That the goods were paid for by payment to plaintiff's agent. Denial that the person paid was plaintiff's agent to receive payment. Plaintiff was an importer of earthenware, and defendant a hotel keeper. Defendant on July 5, 1865, bought at plaintiff's store earthenware amounting to \$320.85 from an agent by the name of Sheridan employed by plaintiff to sell goods on commission. Sheridan sold the goods on credit to be paid on August 1, 1865. On July 6, 1865, the goods were shipped, and a letter was sent by plaintiff to defendant, which said, in part, "please remit amount direct to me." Inclosed was a bill on the

head of which were the words, in red letters, "All remittances on account, or in settlement of bills must be made direct to the principal; salesman not authorized to collect." On August 16, 1865, defendant paid Sheridan for the goods at defendant's hotel, taking receipt signed "J. B. Sheridan, for Henry D. Law." Sheridan absconded with the money. Defendant claims never to have seen the letter, and the bill was handled by his son, who was his bookkeeper and who never read the bill head.

Point Involved: The authority of the agent as determined by the acts and notices of the principal in appointing him.

DEPUE, J.: "* * * A principal is bound by the acts of his agent within the authority he has actually given him, which includes not only the precise act which he expressly authorizes him to do, but also whatever usually belongs to the doing of it, or is necessary to its performance. Beyond that, he is liable for the acts of the agent within the appearance of authority which the principal himself knowingly permits the agent to assume, or which he holds the agent out to the public as possessing. For the acts of the agent, within his express authority the principal is liable, because the act of the agent is the act of the principal. For the acts of the agent, within the scope of the authority he holds the agent out as having, or knowingly permits him to assume, the principal is made responsible; because to permit him to dispute the authority of the agent in such cases would be to enable him to commit a fraud upon innocent persons. In whichever way the liability of the principal is established, it must flow from the act of the principal. And when established, it cannot on the one hand be qualified by the secret instructions of the principal nor on the other hand be enlarged only by the unauthorized representations of the agent. * * *

"Where an agent is intrusted with the possession of goods, with an unrestrained power to sell (Higgins v. Moore, 6 Bosw. 344) or payments are made over the

counter of the principals' store to a shopman accustomed to receive money there for his employer (*Kaye v. Brett*, 5 Ex. 269), the authority to receive payment will be implied in favor of innocent persons, because the principal by his own act gives the agent an authority to receive such payment. But if the principal forbids such payments, and requires all payments to be made to himself personally, or to a cashier, and gives a customer notice thereof, the customer would have no right to insist upon the apparent rather than the real authority of the agent.

"In the case now before the Court, Sheridan had not the possession of the goods. The sale was made on credit, and the payment was made to him, not over the plaintiff's counter at his place of business, but at defendant's hotel. * * *" (The Court, here, holds that the weight of the evidence was that defendant got the letter, but irrespective of that defendant's son got the bill head, and was defendant's agent in that respect, and what he knew or should have known in respect to the agent's limited authority was binding on the defendant. Judgment for plaintiff.)

Question 202: (1.) State the three classes of powers which, as stated by the Court, an agent may possess.

(2.) May the principal qualify the power of the agent by secret instructions?

(3.) May the agent enlarge his authority by his own statements? Why?

(4.) When will the power to receive payment be implied?

Sec. 164. The Authority as Determined by the Apparent Scope of the Appointment.

Case No. 203. *Wood v. McCain*, 7 Ala. 800, 42 Am. D. 612.

Facts: Stedman, being about to leave the state, made one Revis his "general agent" "to transact his business in this state" and delivered to Revis accounts due him for medical services rendered, "for settlement." Revis

as such agent assigned the accounts to one Wood, a surety of Stedman, to be held by Wood as indemnity.

Point Involved: Whether a power generally to transact another's business and to collect and settle accounts receivable gives any power to assign such accounts to principal's surety for his indemnity. Generally, of the powers of universal, general and special agents.

“It is supposed by the counsel for the plaintiff in error, that as Revis was the general agent of his principal, it must be presumed he was authorized to make the assignment in question. This conclusion is by no means a necessary sequence from the premises. General, are clearly distinguishable from universal agents, that is from such as may be appointed to do all the acts, which the principal can personally do and which he may lawfully delegate the power to another to do. ‘Such a universal agency may potentially exist; but it must be of the very rarest occurrence. And, indeed, it is difficult,’ says Mr. Justice Story, ‘to conceive of the existence of such an agency, inasmuch as it would be to make such an agent the complete master, not merely *dux facti*, but *dominus rerum*, the complete disposer of all the rights and property of the principal.’ Such an unusual authority will never be inferred from any general expressions, however broad, but the law will restrain them to the particular business of the party, in respect to which, it is presumed, his intention to delegate the authority was principally directed. Thus, if a merchant in view of his temporary absence, should delegate to an agent his full and entire authority to sell his personal property, to buy any property for him, or on his account, or to make any contracts, or to do any other acts whatsoever, which he could do if personally present—these general terms would be limited to buying or selling, connected with his ordinary business as a merchant; and without some more specific designation, would not be construed, to apply to a sale of his household furniture, or library, or the utensils, provisions, and other necessities used in his family; Story on Agency, 20, 21.

“The difference between a general and special agent, is said to be this: The former is appointed to act in the affairs of his principal generally, and the latter to act concerning some particular object. In the former case, the principal will be bound by the acts of his agent, within the scope of the general authority conferred on him, although those acts are violative of his private instructions and directions. In the latter case, if the agent exceeds the special authority conferred on him, the principal is not bound by his acts: Story on Agency, 114; Paley on Agency, 199; Munn v. Commission Co., 15 Johns. 44, 54 (8 Am. Dec. 219). It is laid down, that an agent employed to buy, has no authority to sell, and *vice versa*: Story on Agency, 81, 82. So an agency for the purpose of accepting or indorsing bills, or notes, does not authorize the agent to purchase or sell goods for his principal: Id. 84. And an authority to take a bond does not in itself embrace the power to receive the money due thereon: Id. 88; nor has an agent, for the purpose of receiving a debt, the power, ordinarily, to receive it in anything else than money, and then only when it is matured: Id. 88, 89.

“In the case at bar, the general words are, ‘to transact his (the principal’s) business in this state,’ but as it respects the books and accounts for medical services rendered by Stedman, these words are restricted, by declaring, that they were delivered to the agent ‘for settlement.’ By this we are to understand, that Revis was to collect, or it may be, otherwise settle these demands, with the persons from whom they were due. It would require a most unwarrantable extension of terms, to hold, that they conferred the power upon the agent, to assign the books and accounts to a surety of his constituent for his indemnity. The citations we have made upon this point are pertinent, and most satisfactorily show, that the assignment in question was not authorized by the power previously given. The assignment might, perhaps, be further objected to, for the reason, that Revis himself was an agent, with the power to settle the accounts,

and could not delegate his authority, or appoint a sub-agent without the assent of his principal: 2 Kent's Com., 4th ed., 633; 1 Livermore on Agency, 54, 64; Story on Agency, 17; Solly v. Rathbone, 2 Mau. & Sel. 299; Coles v. Trecothick, 9 Ves. 251."

Question 203: State the point involved in this case, and the Court's decision.

(2.) What is a "universal agency?" a "general agency?" a "special agency?"

(3.) What further point of objection than that the agent had no authority could be raised in this case, if we assume he did have authority?

(Note: It is laid down in the books generally, that "The principal will be bound by the acts of a general agent, if the latter acted within the usual and ordinary scope of the business in which he was employed, notwithstanding he may have violated the private instructions which the principal may have given him, provided the person dealing with such agent was ignorant of such violation and the agent exceeded his authority. * * *

The authority of an agent being limited to a particular business does not make it special; it may be as general in regard to that as though its range were unlimited. * * *

A special agent is one who is authorized to do one or more specific acts, in pursuance of particular instructions or within restrictions necessarily implied from the act to be done." [Cruzan v. Smith & Thompson, 41 Ind. 288.] On this distinction the cases constantly base their reasoning whether an agent has or not certain apparent powers. But the true test is: what has the principal said or done to give an appearance of power in the agent? If I appoint one to *sell* a horse, obviously he has no authority to *buy* a horse; but if I make him the general manager of my business of buying and selling horses, I give him an authority to do all those acts and things which are usual in that business and which are incidental thereto, and by the facts it might be found that I had impliedly authorized him to buy for cash or on credit, to make warranties in the sales made. This would be determined by all the facts surrounding his appointment. In neither case can I restrict his authority by *secret instructions*, inconsistent with his apparent power. In the special agency few pow-

ers are implied. In the general agency there are many implied powers. But whatever power the agent has must be traced back to something done, said or written by the principal. See the following cases.)

Case No. 204. Wilcox v. Routh, 9 Smedes & Marshall (Miss.) 476.

Facts: The facts are given in the opinion.

Point Involved: Whether a power of attorney specifying in detail the authority to do numerous specific acts constitutes one a general agent with respect to such acts with apparent power to do acts of a closely similar nature.

THATCHER, J.: "The facts in this case were agreed to be as follows: The note sued upon was made by Ferriday, and indorsed by Ferriday as the attorney in fact of Routh. The notice of nonpayment addressed to Routh, was left at Ferriday's counting house, in Natchez. Routh resided indifferently in the city of Natchez and near Grand Gulf, and used the post offices at both places. He sometimes called at Ferriday's counting house for letters and papers, but more generally frequented another store in the same city. The power of attorney, by virtue of which Ferriday indorsed the name of Routh to the note sued upon appointed Ferriday Routh's agent and attorney in fact, general and special, granting to the attorney full power and authority for him and in his name and in the name of his attorney for his own use and benefit, or for the use and benefit of any other persons, to make, indorse, draw, accept and negotiate all promissory notes, bills of exchange, drafts and other securities, of any and every kind whatever, to issue letters of credit, to transact all banking business, to make all manners of renewals and indorsements of his name on all promissory notes, bills of exchange, drafts or other securities of any kind whatsoever, consequent or in any wise dependent upon such renewals, whether the same be payable to him, or to his said attorney, or to any other person or persons, or

corporation or company whatsoever. And generally to do all lawful acts and things whatsoever, concerning or in any wise appertaining to the premises, as he might or could do, if he were personally present and acting therein.

“The first inquiry is whether this power of attorney conferred upon Ferriday the authority to receive notices of the protest of notes indorsed by him as Routh’s attorney, thereby to bind Routh. I think that no such authority was conferred by that power. The acts to be performed are enumerated which always draws the distinction between a general and special agency. 2 Kent. 620. Although the term ‘general’ as well as ‘special’ is employed in describing the agent in the power of attorney under examination, yet the particular purposes for which he was constituted agent being therein enumerated, the agency can only be considered as special, although it is general in reference to the particular purposes for which it is made. *Anderson v. Coonley*, 21 Wend. (N. Y.) 279.

“There is no language in the power expressly granting an authority to the agent to receive notices of protest upon notes made in pursuance of it. Can such an authority be legally presumed from its enumerated powers? When an act precedes or follows another as a necessary and inevitable consequence or precedent, and when from their very nature they are inseparable, the grant of one will necessarily supply the grant of the other; but while they are distinct and separate acts, although entering into the same transaction, the grant of one does not supply the grant of the other.”

Question 204: (1.) State the facts, the question presented and the Court’s decision in the above case.

(2.) Was the above agency general or special? Why?

Sec. 165. Implied or Apparent Powers of Agents: to Borrow Money.

Case No. 205. *Consol. Nat. Bank v. P. C. S. S. Co.*, 95 Cal. 1.

Facts: One Simpson was agent of the defendant

steamship company which conducted a marine freight and passenger business along the Pacific Coast from Mexico to Alaska. G. P. & Co. at San Francisco were its general agents, but it had a local agent at each port on the coast where it did business, who were under the control of the general agency. Simpson was one of these local agents at the port of San Diego, and plaintiff conducted a bank at that point. Simpson kept an account at such bank in the name of "J. H. Simpson, Agent." He deposited sums collected for defendants in this bank and checked out over signatures signed "J. H. Simpson, Agent," the greater portion of which were payable to himself, and actually paid to him. On Oct. 1, 1889, Simpson had overdrawn his account some \$11,404.32, which he was unable to pay and he was removed from his position. Defendant is sued for this amount, with interest.

Point Involved: The circumstances that will raise an implied or apparent authority on the part of an agent, to borrow money.

VANCLIEF, C.: "* * * If Simpson had actual or ostensible authority to borrow money for the defendant, the plaintiff is entitled to recover; otherwise not. This is the ultimate and pivotal question of fact presented for decision. Upon this question the trial court found for the defendant, and I think the finding was justified by the evidence.

"The evidence is positive that no express authority to borrow money * * * was ever given * * *. But counsel * * * contend, in substance, that such authority was implied from the necessity of borrowing money in order to carry on the business which Simpson was employed and authorized to do. The evidence, however, strongly tends to prove that no such necessity ever existed. * * *

"As to the implied power of an agent to borrow money on account of his principal, the Court of Appeals, in *Bickford v. Menier*, 107 N. Y. 490, said: 'If the transaction of the business absolutely required the exercise of

the power to borrow money in order to carry it on then the power was impliedly conferred as an incident to the employment; but it does not afford a sufficient ground for the inference of such a power, to say the act proposed was convenient or advantageous, or more effectual in the transaction of the business provided for; but it must be practically indispensable to the execution of the duties really delegated in order to justify its inference from the original employment. * * *

“There is no evidence of ostensible authority.”

(The court here goes into the evidence to show that the defendant was not by conduct estopped to set up the defense; that they never knew of Simpson's overdrafts; that they had never in any way ratified overdrafts by him, and that the merits of the case were with the defendant.)

Question 205: When will the power to borrow money be implied as illustrated by the facts of this case?

Case No. 206. Merchants Nat. Bank of Peoria v. Nichols & Shepard Co., 223 Illinois 41.

Facts: Suit to recover \$1023.60, the aggregate of 24 checks which created an overdraft to that amount. The checks creating such overdraft were signed “Nichols & Shepard Co. by W. H. Harte, Manager,” Harte being defendant's agent at Peoria. The facts were that the defendant, to sell its threshing machinery, maintained eleven agencies, established in various states; one of these agencies was at Bloomington and then Peoria; Harte was in charge and opened up a bank account at Peoria in the defendant's name and with defendant's knowledge. Harte had entire charge of the Peoria agency, renting a building for the business, employing assistants, fixing and paying salaries, having charge of about fifteen traveling salesmen and one hundred local agents, and paid all bills, and made sales, collections and settlements. He was further authorized to collect all money due defendant in his district, and received checks and drafts, and endorsed them to the bank. The funds with which he carried on the

business were received from sales and settlements or sent to him by defendant.

Point Involved: The implied or apparent power of an agent to borrow money on the facts given.

MR. JUSTICE CARTWRIGHT: “* * * The payment of the checks when there was no funds of the defendant in the bank constituted a loan of the money paid, and defendant never gave Harte any authority to borrow money on its account by that money or any other. He was supplied by the defendant with the necessary funds to execute the duties imposed upon him, and the only occasion for overdrawing the account was his appropriation of defendant’s money. There is no claim that the power was expressly given, but the argument is that the power arose out of the nature of the agency and that plaintiff had a right to assume the power existed. It is to be remembered that persons dealing with an assumed agent are bound, at their peril to ascertain not only the fact of the agency, but the extent of the agent’s authority. They are put upon their peril, by the very fact that they are dealing with an agent, and must, at their peril, see to it that the act done by him is within his power. It is their right and duty to ascertain the extent of his power, and to determine whether his acts come within the power and are such as to bind his principal. (Mechem on Agency, § 276, Reynolds v. Ferree, 86 Ill. 570; 1 Am. & Eng. Ency. of Law,—2d ed.—987.) An agent cannot confer power upon himself, and therefore his agency or authority cannot be established by showing either what he said or did. (Proctor v. Tows, 115 Ill. 138; Mullanphy Savings Bank v. Schott, 135 id. 655.) The source of authority is the principal, and the power of the agent can be proved only by tracing it to that source in some word or act of the alleged principal. In this case there was no evidence tending to prove that the power to borrow money was an incident of the agency. For such an act as that, an agent must have express authority, or some power must be expressly conferred upon him which cannot be otherwise

executed. The fact that the defendant carried on the sale of its products through the medium of agencies distributed over the country would be no ground for a conclusion that the various agents for making sales of machinery and collecting the proceeds were clothed with authority to borrow money. We held in the case of *Jackson Paper Co. v. Commercial Nat. Bank*, 199 Ill. 151, that proof that an agent was the superintendent and manager of a mill, having charge of buying material, hiring men and manufacturing and selling paper, did not justify an inference that he had authority to endorse checks, and surely the same facts or the facts in this case would not justify an inference that Harte had the more unusual power to borrow money and pledge the credit of the defendant."

Question 206: State the facts, the question presented and the Court's decision in the above case.

Sec. 166. Implied or Apparent Powers of Agents: to Make or Endorse Commercial Paper.

Case No. 207. *Graham v. United States Savings Inst.*, 46 Mo. 186.

Facts: The facts are given in the opinion.

Point Involved: Whether an agent who has power to receive payment has implied or apparent authority therefrom to cash the checks payable to his principal's order.

CURRIER, J.: "This suit is brought to recover the amount of two checks which were drawn on the defendant by third parties in favor of the plaintiffs and made payable to their order. The drawers delivered the checks to the plaintiffs' collecting agent, one Dixon, in settlement of certain bills which the latter had in charge for collection, being bills due from the drawer of the checks to the plaintiffs. Dixon indorsed the defendant's firm name upon the checks and presented them at the bank and drew the money upon them, which he seems to have ap-

propriated to his own use, without rendering any account thereof to the plaintiffs. Thus far there appears to be no serious controversy about the facts.

“If Dixon had authority, general or special, to indorse the checks in the manner stated, or the defendant was authorized to pay them without the personal indorsement of the plaintiffs, it is not contended that the defendant would be liable in this action. The verdict of the jury, however, negatives the supposition of the existence of such express authority. The defendant nevertheless undertakes to deduce the authority from the nature and character of Dixon’s general agency in making collections and the transaction of business in behalf of the plaintiffs. Their chief complaint of the action of the court below is founded upon the refusal of the court to give the following instruction, namely: ‘If the jury believe from the evidence that Charles Dixon was, at the times stated in the petition, the clerk and collector of the plaintiffs, and that, as such, he received from the plaintiffs, among other accounts for collection, two accounts, one against Kramer & Loth, and one against Erfort & Petring, and that he was fully authorized and empowered to receive payment of and receipt said bills or accounts, and that, in pursuance of his duties and authority, he received in payment of such accounts the checks set out by the petition, and afterwards collected the money on said checks from the defendant, in accordance with his authority to collect said accounts, then they will find for the defendant.’

“The logic of this instruction is that Dixon was authorized to indorse and collect the checks since he was authorized to receive them in lieu of cash in payment of the bills he held for collection. The deduction is a *non sequitur*. The checks required the bank to pay the sums therein specified to such person as the payee might direct. But the payees never directed payments to be made to any one, unless Dixon was their agent for that purpose; and such agency is not inferable from the mere fact that he was their agent in effecting the collection, nor from all the facts recited in the instruction. His primary duty

was to collect the bills, not the checks given in adjustment of the bills.

“The question presented is purely one of agency. Was Dixon the plaintiffs’ agent to indorse negotiable paper given in settlement of debts due to his employers? He was their agent to adjust such claims and receive the amounts due upon them, and to do those subordinate and incidental things usual and customary in the accomplishment of the main purpose had in view, to-wit: the collection. That main purpose had been accomplished when he had received the checks payable to his principals. His duties as a collector ceased at that point. His next duty was to account with his employers for the proceeds of his collections, and turn over the checks to them, to be disposed of as they might judge proper. The indorsement of the checks was no necessary incident of the collection of the accounts. The instruction was, in my opinion, properly refused. So was the defendant’s second instruction. It travelled out of the issue made by the pleadings. At the instance of the defendant, the Court directed the jury to find for it in case they found from the evidence that Dixon was authorized to collect and receive payments of checks payable to plaintiffs at the time the checks in question were presented and paid. This fairly presented the real point in controversy, and in the form selected by the plaintiff’s counsel.”

Question 207: (1.) Has an agent who has power to receive payment either in money or paper, implied power therefrom to cash the negotiable paper made to his principal’s order? Why?

(2.) Was the agent in the above case a general or special agent?

Sec. 167. Implied or Apparent Powers of Agents: to Sell Personal Property.

(Note: See this subject developed in the cases on Sales.)

Sec. 168. Implied or Apparent Powers of Agents: to Receive Payments.

(See, also, *Law v. Stokes, supra.*)

Case No. 208. Greenhood v. Keaton, 9 Ill. Ap. 183.

Facts: The facts are stated in the opinion.

Point Involved: Under what circumstances an agent has apparent power to receive payment of money owing to his principal.

LACEY, J.: "This was a suit by appellant against appellee, brought for the purpose of recovering sixty dollars, the price of a safe, sold by the former to the latter.

"Appellant was a safe-dealer in the city of Chicago, and the appellee was about starting a hotel in the city of Moline, Ill.

"It appears from the evidence, and it is not disputed, that on the 12th day of Nov., 1879, the appellant employed one George W. Berkley as an agent or broker to travel over the country and take orders, and sell his safe subject to the approval of appellant. When the order was sent in, blank orders and drawings and other papers were placed in the hands of Berkley. The order contained a clause that the order was subject to the approval of the appellant. The authority of Berkley was expressly limited to making sales of safes; he was only to obtain orders to be sent to appellant subject to his acceptance, and to be billed by him. Berkley was not authorized to make collections; the plaintiff was to make his own collections. In pursuance of this arrangement Berkley started out in his employment, and on or about the 15th of Nov., 1879, made sale of one of the safes to appellee for \$60, subject to the approval of the appellant, the appellee signing an order for the safe, directed to the appellant at Chicago, in which it was expressly provided that the order was subject to the appellant's approval, and the order was sent to him in due course of mail. When the order reached appellant at Chicago, it was approved, and the safe duly shipped to appellee and received by him. On the date of the shipment, Nov. 17, A. D. 1879, a letter was sent accompanying it and asking for a remittance for the amount. On the 25th of the same month the appellee sent a letter to the appellant, answer-

ing that the payment for the safe was to be in thirty days which was considered cash.

“On the 26th of the same month the appellant answered that order should have stated that it was to be 30 days, but according to appellee’s demand, asked him to remit to them in thirty days after the date of the receipt of the safe. The thirty days having expired, the appellants drew a sight draft on appellee and sent it forward for collection, to which the appellee replied that he had paid for the safe on the 13th of December of the same year, to G. W. Berkley, the appellant’s agent, from whom he had purchased the safe. At the time of the payment to Berkley he had been out of appellant’s employment about two weeks. The only question is, had Berkley the power to collect the money? If he had, then the judgment is correct; if he had not, then the plaintiff should recover.

“We think, under the circumstances, Berkley had no power to collect the money from appellee, and that payment to Berkley by appellee did not discharge the debt due appellant.

“The power to ‘solicit’ and take contracts does not carry with it the power to collect. No prudent man could reasonably infer from the facts disclosed in evidence, that Berkley had the power to collect the price of the safe. The rule here recognized is well laid down in the following cases. *Abrahams v. Weiller*, 87 Ill. 179; *Clark v. Smith*, 88 Ill. 298.”

Question 208: (1.) State the facts, the question presented and the Court’s decision in the above case.

(2.) From the above case and the case of *Law v. Stokes*, deduce the rule as to the agent’s apparent authority to receive the payment of his principal’s debts.

Case No. 209. *Bailey v. Pardridge et al.*, 134 Ill. 188.

“The question presented by this record is one not entirely free from difficulty. As to the main features of the case there is no substantial controversy in regard to the facts. Holmes had possession of the samples, and claimed

authority to sell and receive the pay therefor. The defendants purchased the samples, paid Holmes for them by check, payable to Joel J. Bailey & Co. or bearer, and he delivered the goods. So far, it appears, the defendants acted in perfect good faith, relying upon the representations of Holmes. * * *

“But it may be said that Holmes was not empowered by the plaintiffs to sell the goods—that he merely held the samples as a means to solicit orders. A sufficient answer to this proposition is, that the acts of plaintiffs since the sale may be regarded as a ratification. Where the owner whose goods have been sold without authority, sues the purchaser for the amount of the contract price for which the goods were sold, the sale although unauthorized will be regarded as ratified. * * *”

Question 209: Why in this case were the defendants precluded from raising the point that Holmes, the agent, had no power to receive payment for the samples? Would you infer he had power to sell the samples?

Sec. 169. Implied or Apparent Power of Agent: to Extend Credit on Sales.

Case No. 210. Komorowski v. Krumdieck, 56 Wis. 23.

Facts: Grist was the agent of Krumdieck and Muir to buy wheat for them with cash furnished him for that purpose. He bought wheat from Komorowski on credit, and subsequently left the country without paying for the wheat. Suit by Komorowski against Krumdieck and Muir for the price of the wheat. Further facts in the opinion.

Point Involved: Whether an agent to buy has apparent power to buy on credit, in the absence of other circumstances authorizing a reasonable belief that he had such power.

TAYLOR, J.: “* * * The power of Grist as the agent of the defendants was limited to purchases for cash, and nothing else, and he was expressly prohibited from tak-

ing wheat in store on their account. When the principal furnishes his agent, to buy on his account, sufficient funds to make the purchases, the law does not raise any presumption that such agent may bind his principal by a purchase on credit, but the contrary. And in such case the principal will not be bound by a purchase made on credit, unless he has knowledge of the fact, and does something in ratification thereof, or unless it be shown that it is the custom of the trade to buy upon credit. The defendants furnished Grist the money to pay for all purchases made by him on their account, and the evidence tends to show that Grist did not deliver to them enough wheat to cover the amount of their advance.

“There is nothing in the evidence tending to show that the defendants held Grist out as having any other powers as their agent than those expressly conferred upon him. There is no evidence that the defendants had ever ratified any purchase by Grist for them upon credit. There is no evidence, in fact, that he ever made any purchase except of the plaintiff upon credit. Nor is there any evidence that an agent to purchase wheat for a principal at a given place, and to ship the same to the principal at another place, has any implied authority to make the purchases upon the credit of the principal. There is nothing in the nature of the business itself, in the absence of any evidence as to the custom of the trade, which would justify a court in determining as a question of law that an agent to purchase wheat or other grain may bind his principal by a purchase on credit.

“An agent to buy wheat or other grain must, in order to bind his principal, who furnishes in advance the funds to make the purchases, buy for cash, unless he has express power to buy upon credit, or unless the custom of the trade is to buy upon credit; and in the absence of express authority, or proof of the custom of the trade to buy on credit, such agent cannot bind his principal by a purchase upon credit of a principal. Paley on Ag. 161, 162; Jaquest v. Todd, 3 Wend. 83; Schimmelpennick v. Bayard, 1 Pet. 264; Story on Ag. 225, 226; Berry v.

Barnes, 23 Ark. 411; Stoddard v. McInvalin, 7 Rich. (S. C.) 525; Whart on Ag., 186; Adams v. Boies, 24 Iowa, 96; Tabor v. Cannon, 8 Met. 456; Temple v. Pomroy, 4 Gray, 128; Bank v. Bugbee, 1 Abb. Ch. App. 86. * * *

“If the evidence is sufficient to show a sale upon credit to Grist as agent of the defendants, and that the wheat was delivered to the defendants, and received by them of Grist, still they would not be liable to the plaintiff unless they received the wheat knowing it had been bought upon credit, or they had received the wheat of Grist knowing they had no funds in his hands at the time sufficient to pay for the same. If they furnished money to their agent sufficient at all times to pay for all the wheat they received by him, they had the right to suppose that all the wheat bought by Grist for them was paid for at the time it was delivered to them, and, if he had not in fact paid for it they would only be liable to the seller under the circumstances above stated. * * *

“The judgment of the circuit court is reversed and the cause remanded for a new trial.”

Question 210: (1.) Has an agent who is appointed to buy, the apparent power for that reason alone, to buy on credit?

(Note: The Court in its statement that the agent has no power to buy on credit unless he has express authority or it is the custom of the trade, restricts the rule rather too much. By placing him in a position from the circumstances of which it could be fairly and reasonably supposed he had that power, the principal could not assert that he did not have it.)

Sec. 170. Implied or Apparent Power of Agent Having Authority to Sell, to Warrant the Thing Sold.

Case No. 211. Johns v. Jaycox, 67 Wash. 403.

Facts: Johns sues to recover the price of 200 talking machines sold by him to Jaycox and Co. The machines were purchased by Jaycox and Co. to give away to their customers, upon a promise by Howard, the salesman

who made the sale, that the defendant would sell 25 records to each machine given away. This warranty was reduced to writing. Defense: breach of the warranty. The agent had no express power to make the promise in question. (The point of ratification was raised, and disposed of by the Court against the purchasers.)

Point Involved: The apparent power of an agent having authority to sell to warrant the thing sold.

ELLIS, J.: “* * *

“There is much seeming confusion in the adjudicated cases upon this question. There are decisions which hold that an agent upon whom general authority to sell is conferred will be presumed to have authority to warrant, unless the contrary appears. *Talmage v. Bierhause*, 103 Ind. 270, 2 N. E. 716; *Woodford v. McClenahan*, 9 Ill. 85; *Alpha Mills v. Watertown Engine Co.*, 116 N. C. 797, 21 S. E. 917; *Dennis v. Ashley’s Admr’s*, 15 Mo. 315; *Milburn v. Belloni*, 34 Barb. 607; *Manley v. Ackler*, 76 Hun 546; *Schuchardt v. Allens*, 1 Wall. 359.

“But an examination of those cases shows that, while announcing a very broad rule, they in reality, when applied to the given facts, go only to the extent that the implied power of warranty by the agent upon which a purchaser may rely extends to those things necessary to consummate the contract and usually incident thereto and relating to the title, quality or condition of the thing sold. In none of them was the rule actually applied as authorizing warranties so extraordinary as that here presented. A careful consideration of the authorities cited in the briefs, as well as an independent search, leads us to the conclusion that the rule laid down in 31 Cyc. as the one supported by the more numerous and more recent decisions is also the one in consonance with the better reason. It is as follows:

“‘The rule which is supported by the more numerous and more recent decisions is that if in the sale of that kind or class of goods which the agent is empowered to sell it is usual in the market to give a warranty, the

agent may give that warranty in order to effect a sale, and the law presumes that he has such authority; and that if an agent with express authority to sell has no actual authority to warrant, no authority can be implied where the property is of a description not usually sold with warranty. * * * The implied power of an agent to warrant title and quality rests upon the necessity and propriety of such warranties in the sale of goods. It is not therefore to be extended to other warranties of an extraordinary sort, however impossible the agent may find it to make a sale without giving such warranties.' 31 Cyc. 1353, 1355, 1356.

"The correct principle, briefly stated, is that an agent under general employment to make sales is impliedly authorized to employ only those means for the purpose usual to the business, and that the purchaser cannot safely assume that he has authority to make any extraordinary guaranty or warranty, or one beyond the usage of the business in which the agent is employed. *Upton v. Suffolk County Mills*, 11 Cush. 586, 59 Am. Dec. 163; *Wait v. Borne*, 123 N. Y. 592, 25 N. E. 1053; *Bierman v. City Mills Co.*, 10 Misc. Rep. 140, 30 N. Y. Supp. 929; *Hayner & Co. v. Churchill*, 29 Mo. App. 676; *Palmer v. Hatch*, 46 Mo. 585; *Reese v. Bates*, 94 Va. 321, 26 S. E. 865; *Waupaca Elec. Light & R. Co. v. Milwaukee Elec. R. & Light Co.*, 112 Wis. 469; 88 N. W. 308; *Troy Grocery Co. v. Potter & Wrightington*, 139 Ala. 359, 36 South. 12; *Anderson v. Bruner*, 112 Mass. 14.

"The rule thus stated appeals to us as the one best calculated to preserve that just balance which the law is intended to maintain between a reasonable protection of the principal from the unauthorized acts of his agent, and a reasonable protection of the purchaser from an unwarranted repudiation by the principal of the acts of the agent. We have been cited to no authority, and a careful search has revealed none, in which it has ever been held that an agent employed to make sales at wholesale has an implied authority not only to warrant the quality of the thing sold but also to guarantee that the purchaser

will make sales thereof at retail in any particular amount or at any given profit. A more extraordinary guaranty can hardly be imagined. We can conceive of no sound principle upon which such a holding could rest."

Question 211: (1.) State the question arising in this case and the Court's decision.

(2.) To what warranties would the apparent power of the agent be confined?

(3.) A had a horse which he desired to sell. He employed B as his special agent to sell the horse, saying nothing about warranties. B sold the horse on inspection to C, warranting him to be sound. The horse was unsound. Can C recover of B? (*Brady v. Todd*, 9 C. B. N. S. 592.)

(Note: The question of the apparent or implied power of the agent to warrant *must not be confused* with the question whether there is an *implied warranty* in a sale regardless of whether it is made by principal or agent. Thus in the law of Sales of Personal Property (Division III, *post*), we will find that in a sale there may be certain implied *warranties*, and this is determined by the character of a sale whether made by principal or agent. Thus, a sale of goods carries with it the implied warranty of title, goods sold by sample are impliedly warranted to be equivalent to the sample, goods sold by description by a manufacturer are warranted to be merchantable, etc. Our inquiry at this point is the power of an agent to *expressly warrant* that the thing sold has virtues that are not implied from the mere fact of sale. Undoubtedly, the courts themselves have not always kept this distinction in mind.

On the apparent or implied power of an agent to bind the principal on an express warranty, the authorities are not in strict accord. Some cases hold that in a general power to sell there is a power to make usual warranties. *Woodford v. McClenahan*, 9 Ill. 85. Other cases hold that from a *mere* power to sell, unaccompanied with other circumstances giving the agent apparent power to warrant, an agent has no apparent power to make express warranties. *Wait v. Borne*, 123 N. Y. 603.)

CHAPTER TWENTY-SEVEN

RIGHTS OF THIRD PERSON AGAINST AN UNDISCLOSED PRINCIPAL

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| § 171. Undisclosed principal may, when discovered, be held by the third party. | § 174. Exceptions based upon the state of accounts between principal and agent. |
| § 172. Exception in case of negotiable instruments. | § 175. Right ceases on election to hold agent. |
| § 173. Exception in case of sealed instruments. | |

Sec. 171. Undisclosed Principal May, When Discovered, Be Held by Third Party.

Case No. 212. Kayton v. Barnett, 116 N. Y. 625.

Facts: This action was brought to recover a balance of the purchase price alleged to be due for certain property sold by plaintiffs to defendants. On March 17, 1881, plaintiffs sold and delivered to one Wm. B. Bishop several machines and assigned to him letters patent for \$4,500. Bishop paid \$3,000 on delivery, and afterwards died insolvent without having paid the balance. Bishop was defendants' agent, but defendants were undisclosed at the time and plaintiffs dealt with Bishop as principal.

Point Involved: Whether when a person deals with another who does not disclose his agency, the principal may upon discovery be held on the contract with the agent.

FOLLETT, CH. J.: When the goods are sold on credit to a person whom the vendor believes to be the purchaser,

and he afterwards discovers that the person credited bought as agent for another, the vendor has a cause of action against the principal for the purchase-price. The defendants concede the existence of this general rule but assert that it is not applicable to this case, because, while Bishop and the plaintiffs were negotiating, they stated they would not sell the property to the defendants, and Bishop assured them he was buying for himself and not for them. It appears by evidence, which is wholly uncontradicted, that the defendants directed every step taken by Bishop in his negotiations with plaintiffs; that the property was purchased for and delivered to the defendants, who have ever since retained it; that they paid the \$3,000 towards the purchase-price, and agreed with Bishop, after the notes had been delivered, to hold him harmless from them. Notwithstanding the assertion of the plaintiffs that they would not sell to the defendants, they, through the circumvention of Bishop and the defendants, did sell the property to the defendants, who have had the benefit of it, and have never paid the remainder of the purchase-price pursuant to their agreement. Bishop was the defendants' agent, Bishop's mind was, in this transaction, the defendants' mind, and so the minds of the parties met, and the defendants having, through their own and their agent's deception, acquired the plaintiffs' property by purchase, cannot successfully assert that they are not liable for the remainder of the purchase-price because they, through their agent, succeeded in inducing the defendants to do that which they did not intend to do, and, perhaps, would not have done had the defendants not dealt disingenuously.

Question 212: What is the rule as to the right of the third person to hold an undisclosed principal? Illustrate by the facts of this case.

Case No. 213. *Watteau v. Fenwick*, [1893] 1 Q. B. 346.
Facts: The facts are stated in the opinion.

Point Involved: Whether an undisclosed principal can be held where he has given an agent general authority to conduct a business for him, but limited that authority with instructions inconsistent with the general character of the agency as it would appear were it not undisclosed.

WILLS, J.: "The plaintiff sues the defendants for the price of cigars supplied to the Victoria Hotel, Stockton-upon-Tees. The house was kept, not by the defendants, but by a person named Humble, whose name was over the door. The plaintiff gave credit to Humble, and to him alone, and had never heard of the defendants. The business, however, was really the defendants', and they had put Humble into it to manage it for them, and had forbidden him to buy cigars on credit. The cigars, however, were such as would usually be supplied to and dealt in at such an establishment. The learned county court judge held that the defendants were liable. I am of opinion that he was right.

"There seems to be less of direct authority on the subject than one would expect. But I think that the Lord Chief Justice during the argument laid down the correct principle, viz., once it is established that the defendant was the real principal, the ordinary doctrine as to principal and agent applies—that the principal is liable for all the acts of the agent which are within the authority usually confided to an agent of that character, notwithstanding limitations, as between the principal and the agent, put upon that authority. It is said that it is only so where there has been a holding out of authority—which cannot be said of a case where the person supplying the goods knew nothing of the existence of a principal. But I do not think so. Otherwise, in every case of undisclosed principal, or at least in every case where the fact of there being a principal was undisclosed, the secret limitation of authority would prevail and defeat the action of the person dealing with the agent and then discovering that he was an agent and had a principal.

"But in the case of a dormant partner it is clear law

that no limitation of authority as between the dormant and active partner as to things within the ordinary authority of a partner. The law of partnership is, on such a question, nothing but a branch of the general law of principal and agent, and it appears to me to be undisputed and conclusive on the point now under discussion.

Question 213: State the facts, the question presented and the Court's decision in this case.

(Note: Accord: *Hubbard v. Tenbrook*, 124 Pa. St. 291.)

Case No. 214. *Merrill v. Kenyon*, 48 Conn. 314.

PARK, C. J.: “* * * exception is taken to that part of the charge [in the court below] in which the judge said: ‘If the plaintiffs knew, while they were furnishing the goods, that Hoyle was an agent, but did not know whose agent he was, the same rule applied as if they did not know that he was an agent at all.’ [The Court here reviews authorities to show that this charge correctly stated the law.]”

Question 214: State the rule of law announced by the above case.

Sec. 172. Exception in Case of Negotiable Instruments.

(Note: Only a party to a negotiable instrument can sue or be sued thereupon. See cases 198 and 199, *supra*.)

Sec. 173. Exception in Case of Sealed Instruments.

(Note: It is also the common law that only a party to a sealed instrument can sue or be sued thereupon. If, however, the seal is unnecessary and may be rejected as surplusage, the law of undisclosed principal will apply thereto.)

Sec. 174. Exception Based upon the State of Accounts Between Principal and Agent.

Case No. 215. *Laing v. Butler*, 37 Hun (44 N. Y. Sup.) 144.

Facts: Suit to recover the sum of \$867.23 as the contract price of a quantity of hides sold by plaintiffs to Edward F. Smith who was the undisclosed agent of the defendants. Defendants had furnished Smith with the money for the hides, but he bought upon credit.

Point Involved: Whether an undisclosed principal who has settled with his agent for the goods bought under the agency, can be held after such settlement by the third person.

HAIGHT, J.: “* * *

“We have thus briefly alluded to some of the authorities both in England and in this country which bear upon the question under consideration. They are the nearest in point of any which we have been able to discover. From them, it appears to us that where an agent buys in his own name, but for the benefit of his principal, without disclosing the name of the principal the rule is that the principal as well as the agent will be bound, provided the goods are received by the principal, if the agent in making the purchase acted within his power as agent; but that this rule is subject to the following limitations and exceptions: First, the purchase of the agent must be within the power conferred upon him by his principal, or it must be shown that the principal subsequently ratified his acts. Second, if the principal furnished the agent with the money with which to make the purchase before the purchase, and the agent should, without his knowledge, purchase the property upon credit without disclosing his principal, that the principal will not be bound; and, Third, where the purchase has been made by the agent upon credit, authorized by the principal, but without disclosing his name, and payment is subsequently made by the principal to the agent in good faith before the agency is disclosed to the seller, then the principal would not be liable. In the case under consideration, it appears that the defendants authorized Smith to purchase the hides for them; that they advanced the money to him with which to make the purchases they had authorized. The

plaintiff in selling the hides to Smith, sold to him upon his individual credit and promise to pay. The case therefore appears to us to be with the exceptions to the rule mentioned, and it consequently follows that the plaintiff is not entitled to recover.”

Sec. 175. Right Ceases on Election to Hold the Agent.

Case No. 216. Kingsley v. Davis, 104 Mass. 178.

MORTON, J.: “* * * The general principle is undisputed, that when a person contracts with another who is in fact an agent of an undisclosed principal he may, upon discovery of the principal, resort to him, or to the agent with whom he dealt, at his election. But if, after having come to a knowledge of all the facts he elects to hold the agent, he cannot afterwards resort to the principal. In the case at bar, it is admitted that the plaintiffs after all the facts became known to them, obtained a judgment against John J. Davis [the agent] upon the same cause of action for which this suit is brought. We are of opinion that this was conclusive evidence of an election to resort to the agent, to whom the credit was originally given, and is a bar to this action against the principal.”

Question 216: What is the doctrine of election as to the right to hold an undisclosed principal? What in this case was held to show, conclusively, an election?

(Note: Prosecuting to final judgment with full knowledge of the facts is in law an election. But ordinarily an election is a question of fact for the jury.)

CHAPTER TWENTY-EIGHT

KNOWLEDGE OF THE AGENT AS KNOWLEDGE OF THE PRINCIPAL

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| § 176. Notice to an agent is notice to the principal. | § 179. Not notice when agent not at liberty to disclose. |
| § 177. Such notice must be within the scope of the agency. | § 180. Not notice where agent is acting adversely to principal. |
| § 178. Time at which notice must be given. | |

Sec. 176. Notice to Agent Is Notice to Principal.

Case No. 217. Jenkins Bros. Shoe Co. v. G. V. Renfrow & Co., 151 N. C. 323.

Facts: The shoe company sued defendants, as partners, to recover an amount due it for goods sold and delivered. Defendant T. J. Renfrow contends that he is not liable on the ground that before the sale, to-wit, on March 28, 1907, the partnership was dissolved, of which the plaintiff had notice. The order was taken by the shoe company's traveling salesman, April 4, 1907, subject to acceptance by the company, and the goods were delivered in May. The traveling salesman testified he received notice when he took the order. He did not communicate his knowledge to his principal.

Point Involved: When notice to an agent is notice to the principal; whether a traveling salesman in selling goods has a duty to impart notice of dissolution of a partnership from whose successor he takes an order.

MANNING, J.: “* * *

“In Mechem on Agency, sec. 721, the learned author

deduces the following rule from the authorities: 'The law imputes to the principal and charges him with all notice or knowledge relating to the subject-matter of the agency which the agent acquires or obtains while acting as such agent and within the scope of his authority or which he may previously have acquired, and which he then had in mind, or which he had acquired so recently as to reasonably warrant the assumption that he still retained it. Provided, however, that such notice or knowledge will not be imputed (1) where it is such as it is the agent's duty not to disclose, and (2) where the agent's relation to the subject-matter or his previous conduct render it certain that he will not disclose it, and (3) where the person claiming the benefit of the notice, or those whom he represents, colluded with the agent to cheat or defraud the principal.' There is no evidence in this case bringing it within any of the exceptions named in the proviso of the above rule. This Court, in *Straus v. Sparrow*, 148 N. C. 309, quotes with approval this principle, as stated in *Cox v. Pearce*, 112 N. Y. 637; 3 L. R. A., p. 563: '1. The failure of an agent to communicate to his principal information acquired by him in the course and within the scope of his agency is a breach of duty to his principal; but as notice to the principal it has the same effect as to third persons as though his duty had been faithfully performed.' *Mfg. Co. v. Rutherford*, 64 S. E. Rep. 444.

"If, therefore, Horn was such an agent that notice to him was notice to his principal, the plaintiff, then, under the above authorities, it must follow that the plaintiff had notice of the withdrawal of the defendant T. J. Renfrow from the firm, and its dissolution before 15 May—between 6 and 15 May, as fixed by Horn. * * * Was Horn such an agent that notice to him was notice to his principal? The evidence offered at the trial tends to show that Horn was a traveling salesman of the plaintiff, and defendants made all their purchases, extending over several months, from plaintiff through Horn; that he was the sole representative of plaintiff in the section

in which defendants did business, and visited their place of business nearly every thirty days; that he reported to plaintiff references given by new customers; that he reported dissolutions of partnerships with whom plaintiff was dealing, and sometimes received payments for bills due, when offered him by merchants, but that he was not instructed to collect bills; that he in a general way inquired about the condition of the business of those with whom he was dealing for plaintiff.

“* * * Our holding [is] that the evidence was sufficient to support a finding that Horn was a competent agent to receive notice, and that notice to him was notice to the plaintiff, his principal. Horn was, by his course of dealing and the scope and extent of his power, the medium of negotiations between plaintiff and defendant partnership.”

Question 217: State the points involved in this case and the Court's decision.

Sec. 177. Such Notice Must Be Within the Scope of the Agency.

(See also Case No. 217, *supra*.)

Case No. 218. Congar v. C. & N. Rwy. Co., 24 Wis. 157.

Facts: Plaintiff, Congar, shipped trees over defendant's road, from Wisconsin to Iuka, Iowa. The goods were sent to another town of the same name in the same state. The agents of the company at the right destination had notice that the goods were to arrive there.

Point Involved: Whether the notice to these agents was notice to the company.

DIXON, C. J.: “The decision of the court below, as shown by the written opinion of the learned judge found in the printed case, turned upon the point that, for the purpose of charging the company with negligence in shipping the goods over the wrong road, notice to any of its

agents was notice to the company. In other words, the court held, that the knowledge of the agents residing in the state of Iowa, and transacting the business of the company there, of a place in that state named Iuka, and that goods destined for that place were to be deposited at the nearest station on the line of the company's road, called Toledo, was the knowledge of the company, so as to make the company responsible for any injury resulting from the mistake of its agents residing and transacting its business at the city of Chicago, in the state of Illinois, in forwarding the goods from the latter place by another railroad, instead of over the company's own road, although such mistake occurred without any negligence whatever on the part of the agents making it; but after they had taken reasonable and proper care to ascertain the route by which the goods should be forwarded, and had forwarded them in accordance with the information so obtained. This, we think, was an erroneous application of the doctrine that notice to the agent is notice to the principal. Such notice, to be binding upon the principal, must be notice to the agent when acting within the scope of his agency, and must relate to the business, in which he is engaged, or is represented as being engaged, by authority of his principal. It must be the knowledge of the agent, coming to him while he is concerned for the principal, and in the course of the very transaction which is the subject of the suit, or so near before it that the agent must be presumed to recollect it. Story on Agency, § 40, and 2 Kent's Com. 630, and note, and cases cited. Notice, therefore, to the agents in Iowa, distant some two or three hundred miles from the city of Chicago, who had distinct duties to perform, and were not at all concerned in the business of forwarding the goods from Chicago, was not such notice as will bind the company in relation to that business, the same having been transacted by other agents, who had no such notice. This seems very clear, when we consider the reason and ground upon which this doctrine of constructive notice rests. The principal is chargeable with the knowledge of his

agent, because the agent is substituted in his place, and represents him in the particular transaction; and it would seem to be an obvious perversion of the doctrine, and to lead to most injurious results, if, in the same transaction, the principal were likewise to be charged with the knowledge of other agents, not engaged in it, and to whom he had delegated no authority with respect to it, but who were employed by him in other and wholly different departments of his business.”

Question 218: State the facts, the question presented and the Court’s decision in this case.

Sec. 178. Time at Which Notice Must Be Given.

Case No. 219. The Distilled Spirits, 11 Wall. (U. S.) 356.

Facts: Information filed by the United States Government upon seizure of 278 barrels of distilled spirits on account of violation of the revenue laws. Harrington and Boyden appeared and claimed ownership to different barrels. They claimed to have purchased in open market without knowledge of the fraud. Instructions given on the evidence to the effect that if Boyden was agent for Harrington in buying the spirits brought by Harrington, and Boyden knew of the fraud, Harrington would be bound by that knowledge.

Point Involved: Whether an agent who before his appointment as agent has knowledge of facts affecting the agency, the principal is bound thereby.

MR. JUSTICE BRADLEY: “* * *

“The question how far a purchaser is affected with notice of prior liens, trusts, or frauds, by the knowledge of his agent who effects the purchase, is one that has been much mooted in England and this country. That he is bound and affected by such knowledge or notice as his agent obtains in negotiating the particular transaction, is everywhere conceded. But Lord Hardwicke thought that the rule could not be extended so far as to affect the principal by knowledge of the agent acquired previously

in a different transaction. Supposing it to be clear, that the agent still retained the knowledge so formerly acquired, it was certainly making a very nice and thin distinction. Lord Eldon did not approve of it. In *Mountford v. Scott*, he says: 'It may fall to be considered whether one transaction might not follow so close upon the other as to render it impossible to give a man credit for having forgotten it. I should be unwilling to go so far as to say, that if an attorney has notice of a transaction in the morning, he shall be held in a court of equity to have forgotten it in the evening; it must in all cases depend upon the circumstances.' The distinction taken by Lord Hardwicke has since been entirely over-ruled by the Court of Exchequer Chamber in the case of *Dresser v. Norwood*. So that in England the doctrine now seems to be established, that if the agent, at the time of effecting a purchase, has knowledge of any prior lien, trust, or fraud, affecting the property, no matter when he acquired such knowledge, his principal is affected thereby. If he acquire the knowledge when he effects the purchase, no question can arise as to his having it at that time; if he acquired it previous to the purchase, the presumption that he still retains it, and has it present to his mind, will depend on the lapse of time and other circumstances. Knowledge communicated to the principal himself he is bound to recollect, but he is not bound by knowledge communicated to his agent, unless it is present to the agent's mind at the time of effecting the purchase. Clear and satisfactory proof that it was so present seems to be the only restriction required by the English rule as now understood. With the qualification that the agent is at liberty to communicate his knowledge to his principal, it appears to us to be a sound view of the subject. The general rule that a principal is bound by the knowledge of his agent is based on the principle of law, that it is the agent's duty to communicate to his principal the knowledge which he has respecting the subject-matter of negotiation, and the presumption that he will perform that duty. When it is not the agent's duty to communicate

such knowledge, when it would be unlawful for him to do so, for example, when it has been acquired confidentially as attorney for a former client in a prior transaction, the reason of the rule ceases, and in such a case an agent would not be expected to do that which would involve the betrayal of professional confidence, and his principal ought not to be bound by his agent's secret and confidential information. This often happened in the case of large estates in England, where men of great professional eminence were frequently consulted. They thus became possessed, in a confidential manner, of secret trusts or other defects of title, which they could not honorably, if they could legally, communicate to subsequent clients. This difficulty presented itself to Lord Hardwicke's mind, and undoubtedly lay at the bottom of the distinction which he established. Had he confined it to such cases, it would have been entirely unexceptionable.

"The general tendency of decisions in this country has been to adopt the distinction of Lord Hardwicke, but it has several times been held, in consonance with Lord Eldon's suggestion, that if the agent acquired his information so recently as to make it incredible that he should have forgotten it, his principal will be bound. This is really an abandonment of the principle on which the distinction is founded. The case of *Hart v. Farmers' and Mechanics' Bank* adopts the rule established by the case of *Dresser v. Norwood*. Other cases, as that of *Bank of United States v. Davis*, *New York Central Insurance Co. v. National Protection Co.*, adhere to the more rigid view. * * *

Question 219: Is a principal bound by the agent's knowledge acquired prior to the agency? State the rule as given in the above case.

Sec. 179. Not Notice Where Agent Not at Liberty to Disclose.

(Note: See remarks and illustration given in *The Distilled Spirits, supra.*)

**Sec. 180. Not Notice Where Agent Is Acting Adversely
to Principal.**

Case No. 220. Craft v. So. Boston R. R. Co., 150 Mass.
200.

FIELD, J.: “* * *

“The general rule is that notice to an agent while acting for his principal of facts affecting the character of the transaction is constructive notice to the principal.
* * *. There is an exception to this rule when the agent is engaged in committing an independent fraudulent act on his own account, and the facts to be imputed relate to the fraudulent act. * * *.”

Question 220: State the exception noted in this case.

CHAPTER TWENTY-NINE

THE ADMISSIONS AND DECLARATIONS OF THE AGENT AS BINDING UPON THE PRINCIPAL

§ 181. Agent's declarations of his
own agency or authority
not binding on principal.

§ 182. Admissions of agent as part
of his act binding on prin-
cipal.

Sec. 181. Agent's Declarations of His Own Agency or Authority Not Binding on Principal.

Case No. 221. Lew v. Mayer, 52 Kans. 419.

Facts: Jacob Lew & Sons sue the members of the partnership of Mayer Sells & Co. for goods sold and delivered. Defense, that Keyes, an agent of the plaintiffs, had made a settlement by which he had agreed to look to one of the partners alone and to release the others. This authority of the agent to make such a settlement is denied. The court instructed the jury to the effect that if Keyes so conducted and declared himself as to lead the defendants to believe that he was authorized to make the arrangement and that they acted on that belief, the plaintiffs would be bound. Verdict and judgment for defendants. Plaintiffs appeal, alleging that this instruction was error.

Point Involved: Whether a principal is bound by the declarations of an agent as to his authority or the extent thereof.

JOHNSON, J.: “* * * As the authority of Keyes was a disputed question of fact, the importance of the instruction was easily seen. * * *. This instruction

was clearly erroneous. * * * it is clear that the agency or authority cannot be established by the declarations of the alleged agent, and testimony of his act or conduct is of no greater value for that purpose. * * *

Question 221: What is the reason for the rule that the declarations or admissions of an agent as to his authority are not binding on the principal?

Sec. 182. Admissions of Agent as Part of His Act Binding on Principal.

Case No. 222. White v. Miller, 71 New York 118.

Facts: Plaintiff sued defendant for breach of warranty as to the character of cabbage seed. To prove the defective character of the seed, plaintiff offered in evidence a conversation alleged to have occurred between plaintiff and the agent of defendant, with whom nearly eight months before, the sale had been contracted. This conversation was objected to as not binding on the defendant.

Point Involved: Under what circumstances the admissions of an agent are binding upon his principal.

ANDREWS, J.: “* * * The general rule is, that what one person says out of court is not admissible to charge or bind another. The exception is in cases of agency, and in cases of agency the declarations of the agent are not competent to charge the principal, upon proof merely that the relation of principal and agent existed when the declarations were made. It must further appear that the agent, at the time the declarations were made, was engaged in executing the authority conferred upon him, and that the declarations related to, and were connected with the business then depending, so that they constituted a part of the *res gestae*. * * *

Question 222: State the rule of the above case.

CHAPTER THIRTY

RESPONSIBILITY OF PRINCIPAL OR MASTER FOR TORTS OF AGENT OR SERVANT

§ 183. Principal or master liable in cases of prior authorization in fact.

§ 184. Principal or master liable in cases of ratification.

§ 185. Principal or master liable when tort committed within scope of authority or employment.

Sec. 183. Principal or Master Liable in Cases of Prior Authorization.

(Note: If one authorizes or directs the commission of a tort by another he is liable as though the tort were by him in person.)

Sec. 184. Principal or Master Liable in Cases of Ratification.

(See Case No. 173, *supra*.)

Sec. 185. Principal or Master Liable When Tort Committed Within Scope of Authority or Employment.

Case No. 223. Lloyd v. Grace et al., [1912] A. C. 716.

Facts: The facts are given in the opinion.

Point Involved: Whether a principal is liable for the fraud of his agent, committed within the general scope of the agent's duties, the principal taking no benefit from said fraud, and in no way consenting to or ratifying the same.

(Opinions of Earl of Halsbury, Lord MacNaghten, Lord Atkinson and Lord Shaw, omitted.)

“EARL LOREBURN: My Lords, the facts of this case, except in immaterial points, are quite clear and undisputed.

“The appellant, Mrs. Lloyd, had bought some property, and thus had come to know of the defendant, a solicitor. She had doubts about having got her money’s worth, and went to the defendant’s office to inquire. When there she saw one Sandles, the defendant’s managing clerk, and was induced by him to give him instructions to sell or realize this property, and for that purpose to give him the deeds and to sign two documents which she neither read nor knew the tenor of, but which put into Sandles’ possession her interest therein. She gave him the deeds as the defendant’s representative. Having got them and the signed documents, he dishonestly disposed of this lady’s property and pocketed the proceeds. That is the whole story as it is now either found or admitted because it was incontestable.

“It is clear to my mind, upon these simple facts, that the jury ought to have been directed, if they believed them, to find for the plaintiff. The managing clerk was authorized to receive deeds and carry through sales and conveyances, and to give notices on the defendant’s behalf. He was instructed by the plaintiff, as the representative of the defendant’s firm,—and she so treated him throughout—to realize her property. He took advantage of the opportunity so afforded him as the defendant’s representative to get her to sign away all that she possessed and put the proceeds into his own pocket. In my opinion there is an end of the case. It was a breach by the defendant’s agent of a contract made by him as defendant’s agent to apply diligence and honesty in carrying through a business within his delegated powers and entrusted to him in that capacity. It was also a tortious act committed by the clerk in conducting business which he had a right to conduct honestly, and was instructed to conduct, on behalf of his principal.

“At the hearing the learned judge, no doubt with a view to avoid the risk of a new trial in so small a case,

appears to have been prevailed upon to put no less than six questions, with subdivisions making in all ten questions, to the jury. Some of them were quite immaterial. Others were framed in order to raise a point of law supposed to be affirmed by Willes J. in the case of *Barwick v. English Joint Stock Bank* in a passage which admitted of more than one meaning. The meaning of the answers depends upon how the jury understood the questions, and we were not told how they were explained to the jury. That Sandles committed this fraud in order to steal the money for himself is obvious, and any jury must so find. That he did it in the sense in which Willes J. means the word 'benefit' is not true upon the admitted facts. Willes J. cannot have meant that the principal is absolved whenever his agent intended to appropriate for himself the proceeds of his fraud. Nearly every rogue intends to do that.

"I have only to say, as to the authority of *Barwick v. English Joint Stock Bank*, that I entirely agree in the opinion about to be delivered by Lord MacNaghten. If the agent commits the fraud purporting to act in the course of business such as he was authorized, or held out as authorized, to transact on account of his principal, then the latter may be held liable for it. And if the whole judgment of Willes J. be looked at instead of one sentence alone, he does not say otherwise."

Question 223: What were the facts in the above case, and what did the Court hold?

Case No. 224. *Daniel v. Atlantic Coast Line R. R. Co.*, 136 N. C. 517.

Facts: Daniel sues the R. R. Co. for damages caused by his wrongful arrest and imprisonment. The R. R. Co. had a station at Greenville, N. C. Daniel went to said station to take passage on one of defendant's trains, and finding the passenger depot closed, went to the freight depot and was invited into the office by Atkinson, the agent of the company. Atkinson was counting money

and putting it into a package. Atkinson then put the money in a drawer and locked it, and went out to supper. Daniel in a few minutes went out after him, leaving several people who were waiting there. When the train arrived, plaintiff boarded it and went to Kinston, where he was to change cars, and missing connections, went to a hotel at Kinston. The agent at Greenville then called up the agent, Meacham, at Kinston, whereupon the agent at Kinston went with a policeman to the hotel, and demanded entrance to Daniel's room. They made a search for the money, and later arrested Daniel, taking him to the guard house, where he was later released. On the following Sunday he was re-arrested on direction of the agent at Greenville. On the trial Daniel was discharged. Atkinson's duties were to collect money for freight, sell tickets to passengers, take care of the money received, and forward same to company's treasurer.

The R. R. Co. claims that it is not responsible for the arrest.

(Editor's note: It may be explained parenthetically that one who causes the arrest of another is liable in damages therefor when he acts without probable cause. We may assume that there was no probable cause in this case and that the company would be liable if the act was within the scope of the agent's employment.)

Point Involved: Under what circumstances, if any, a principal is liable for the tort of malicious prosecution or false arrest by his agent, where he has not expressly authorized such prosecution or arrest, and where he has not expressly made it the agent's duty to prosecute or arrest.

WALKER, J.: "The foregoing statement of the testimony [here given in brief resume] is sufficient to present the point upon which the case turns, namely, the authority of the agent of the defendant to cause the arrest to be made. We are not concerned so much with the manner in which the arrest was made as we are with

the question whether the defendant, who was the principal of Atkinson and Meacham, is to be charged with liability for their tortious acts. That their conduct toward the plaintiff was inexcusable, if not criminal, and justly provokes the resentment of every good and law abiding citizen against them, may be freely admitted.

* * * The excesses of Atkinson and Meacham do not establish the defendant's liability. That can be shown only by proof that the defendant authorized the acts to be done, or that, after they were done, it ratified them.

* * * The plaintiff's sole contention is that what Atkinson did at Greenville and Meacham at Kinston was within the line of their duty and the scope of their employment, and therefore they had implied authority from defendant to do what they did, upon the theory, we suppose, that every authority carries with it or includes in it, as an incident, all the powers which were necessary, proper, or usual as means to effectuate the purposes for which it was conferred, and that consequently when an agency is created for a specified purpose or in order to transact particular business, the agent's authority by implication embraces the appropriate means and power to accomplish the desired end. * * * This is the general rule and the doctrine of *respondeat superior* is a familiar one. But in our opinion it has no application to the facts of this case. If we should hold it is so broad in its scope as to include a case like this, it would lead to most dangerous consequences.

“For us to say that an agent can by his acts subject his principal to liability in damages to any one injured by his said acts done when he was not about his master's business and had no express or implied authority to do them, but was merely seeking to avenge a supposed wrong already committed or to vindicate public justice, would be carrying the doctrine of *respondeat superior* far beyond its acknowledged limits. A servant entrusted with his master's goods may do what is necessary to preserve and protect them, because his authority to do so is clearly implied by the nature of the service, but

when the property has been taken from his custody or stolen and the crime has already been committed, it cannot be said that a criminal prosecution is necessary for its preservation or protection. This may lead to the punishment of the thief or the trespasser, but it certainly will not restore the property or tend in any degree to preserve or protect it. It is an act clearly without the scope of the agency and cannot possibly be brought within the limits of the implied authority of the agent."

Question 224: What were the facts, the question presented and the Court's decision? (Compare with the following case.)

Case No. 225. Staples v. Schmidt, 18 R. I. 224.

Facts: The facts are stated in the opinion.

Point Involved: The responsibility of a principal for a wrongful arrest by his salesman and custodian of a customer suspected of "shoplifting."

DOUGLAS, J.: "The jury has substantially found in this case that the defendant's salesman erroneously suspecting the plaintiff of having stolen a package of spoons from the store which was in his charge, detained her, sent for a police officer and caused her to be sent to the police station and there searched. * * *

"* * *

"* * * the defendants say that the acts here complained of were not within the scope of their agent's employment. It is obvious that in most cases the question is one of fact. What are the limitations of an agent's or a servant's authority depends generally upon the things he is to do, the object he is set to accomplish, the degree of discretion which the position where he is placed and the exigencies of the occasion reasonably call for. These are matters of common knowledge when they pertain to the ordinary occupations of men, matters of fact, as well known to the jury as to the court, or inferences of fact from well known or proven facts which it is as much the province of the jury to draw as it is the province

of the court to carry out a principle of law to particular deductions.

“* * *

“Two principles seem to be recognized by the English cases cited.

“*First.* That when a servant not specially appointed to protect property arrests a person whom he supposes to have stolen his master’s goods, the servant must be presumed to have acted in pursuance of his duty as a good citizen and not in the scope of his employment as a servant. This was strenuously urged by counsel in *Edwards v. London & North Western Railway Co.*, L. R. 5 C. P. 445, and was adopted by the court as the rule for that case. We doubt its cogency as a rule of universal application. The arrest of a thief is not an ordinary necessity of commercial business. An attempt to steal is an extraordinary event which puts the guardian of the property to an instantaneous election of means to frustrate it. A clerk or salesman in such a case may *ex necessitate* be invested with duties and powers which are more germane to the scope of employment of an officer. The opinions of the judges, however, are instructive in this connection as showing assent to the converse of the proposition, which is nearer the case at bar.

“* * *

“It is quite true that the master would have had no right to arrest and search an innocent person; but it is equally true that he would have had the right to detain a thief and to recapture his property from him. The case, therefore, was one where the act, aside from any excessive force, might be lawful or unlawful according to whether the supposed circumstances were real or unreal. The servant was left in a situation where he was obliged to determine the fact and where his duty to his master depended upon his decision. The decision was his, as the substitute of the master, and the act was one intended by him to be for his master’s benefit and which his duty required if the facts were as supposed. Hence, as to third persons, it was the master’s act. The cri-

terion of the master's liability can never be whether the act would have been lawful for the master to have done in the circumstances as they actually existed.

"It remains to apply these principles to the case at bar. The servant in this case was left with an assistant in charge of his master's store. His ordinary duties undoubtedly were to show goods and to sell them to customers. It was, however, equally his duty to protect his master's property from pilfering. The acts complained of were evidently done with that intention. The arrest was for the purpose of searching for and recovering the master's property, not with the object of punishing crime against the public. The establishment was not a railroad station where the multiplicity of employees confines each one to a narrow round of duties, where special officers are stationed to preserve order and detain criminals, nor a large dry goods emporium where detectives and watchmen are employed to guard against thieves. The servant here was salesman and custodian in one. Whatever the master might do in the protection of his property he expected his servant to do in his absence. If the servant had seen the plaintiff take up and secrete the package of spoons in question and had allowed her to walk away with them unmolested, could anyone say that he had not been derelict in his duty to his master? If in the performance of this duty he mistook the occasion for it, or exceeded his powers or employed an improper degree of compulsion, the mistake and the excess must be answered for by the master."

Question 225: (1.) State the facts in this case, the question presented and the Court's decision.

(2.) The M. R. Co. employed A, as a ticket agent. M purchased a ticket and paid therefor a coin, which the agent immediately after taking, pronounced as counterfeit. On her refusal to accept it back, he denounced her as a counterfeiter and detained her for arrest. Was the company liable? (*Palmeri v. M. R. Co.*, 133 N. Y. 261.)

(3.) A conductor for the M. R. Co. caused the arrest of a passenger for disturbing the peace. The arrest was wrongful.

Is the company liable? (Ruth v. St. L. T. Co., 98 Mo. Ap. 1.)

(4.) A left home with the intention of going to R's store to trade. Before she entered the store and while she was standing looking into a show window, a detective employed by the company caused her arrest, accusing her of shoplifting. Is R liable? (Vrchotka v. Rothschild, 100 Ill. Ap. 268.)

Case No. 226. Joel v. Morrison, 6 C. & P. 501.

Facts: Plaintiff sues to recover damages, alleging that as he was crossing on foot a public highway, a cart and horse, under the care and direction of a servant of the defendant, was driven negligently against him and he was thrown down and injured. The evidence was conflicting whether the servant was about his master's business or on a journey of his own. The jury found for the plaintiff.

Point Involved: Whether a master is liable when the servant in driving a vehicle for the master, deviates from the journey for his own purposes or goes on a journey of his own.

PARKE, B.: In summing up to the jury said:

"This is an action to recover damages for an injury sustained by the plaintiff, in consequence of the negligence of the defendant's servant. There is no doubt that the plaintiff has suffered injury, and there is no doubt that the driver of the cart was guilty of negligence, and there is no doubt also that the master, if that person was driving the cart on his master's business, is responsible. If the servants, being on their master's business, took a detour to call upon a friend, the master will be responsible. If you think the servants lent the cart to a person who was driving without the defendant's knowledge, he will not be responsible. Or, if you think that the young man who was driving took the cart surreptitiously, and was not at the time employed on his master's business, the defendant will not be liable. The master is only liable where the servant is acting in the course of his employment. If he was going out of his way,

against his master's business, he will make his master liable; but if he was going on a frolic of his own, without being at all on his master's business, the master will not be liable. As to the damages, the master is not guilty of any offense, he is only responsible in law, therefore the amount should be reasonable."

Question 226: (1.) Where the servant deviates from his master's business, and commits a tort during such deviation is the master liable? What is the test?

(2.) A is employed as P's locomotive engineer. While the engine is standing at a depot awaiting time for departure, A blows the whistle as a practical joke to scare M's horse which is standing near and on which M is riding. The horse runs away and injures M. Is P liable?

(3.) A employed by P as a bricklayer, observes S, against whom he holds enmity, approaching. He hurls a brick at S and injures him. Is P liable?

Case No. 227. *Cunningham v. Castle*, 111 N. Y. Suppl. 1056.

Facts: Defendant owned an automobile and employed one Boes as his chauffeur. The chauffeur asked to borrow the machine to take a trip of his own and permission being granted he went on the trip, and in the course thereof he collided with and injured plaintiff. Plaintiff sues defendant.

CLARKE, J.: "* * *

"From the foregoing cases we may deduce the following rules as thoroughly established: First, that a master is responsible for the negligence of his servant when engaged about the master's business and within the scope of his employment; second, that a master is not responsible for the negligence of his general servant, if at the time of the negligence he has become *ad hoc* the servant of another, and engaged in the business of that other, and under his direction and control; third, that the master is not responsible for the negligence of his general servant, if the negligent act was committed by

the servant not in the prosecution of the master's business, but in the course of some private enterprise of his own; fourth, that even if, in the prosecution of that private enterprise, the servant uses the instrumentalities of the master for his own purposes, without the knowledge and consent of the master, the master is not responsible.

"For the purpose of this discussion it must be conceded that the chauffeur was not engaged in the master's business, but was on a private pleasure trip of his own, and was using therein the master's automobile with the master's knowledge and consent. It is urged that the automobile was a dangerous instrumentality, and that, having been intrusted to the chauffeur, the liability of the master still attached because of its dangerous character. The automobile is not necessarily a dangerous device. It is an ordinary vehicle of pleasure and business. It is no more dangerous *per se* than a team of horses and a carriage, or a gun, or a sailboat, or a motor launch. There is no evidence that the chauffeur was not competent and qualified to run the machine. In fact, he was employed by the defendant for that very purpose. If a gamekeeper had borrowed his master's gun, and had gone from the estate on a hunting expedition of his own, and had negligently shot a man, would the master be responsible because he was using that instrumentality, which might be dangerous if carelessly used—the gun?

"I do not think that the question of the ignorance or consent of the master has any bearing whatever upon his liability. The fact that the servant has used the horses or the automobile without his consent has probative force upon the proposition as to whether or not the servant was engaged in the master's business and was acting within the scope of his employment. The question is whether he was or not. If, without the knowledge of his master, he took the car from the garage to a machine shop to have it fixed, and an accident occurred, the fact of the want of knowledge on the master's part would

not affect the liability, because the act would be within the scope of the servant's employment and in the prosecution of the master's business. If the chauffeur were granted a two week's vacation, and the master said to him: 'I am going off on a trip, and will not need the machine. You may take it and use it for your own pleasure while I am gone,' I cannot think that he would be responsible for any negligence of the chauffeur during that period.

“* * *

“I reach the conclusion that upon principle and authority the charge was fatally erroneous in the matter excepted to, and that a question of fact was presented upon this evidence, which was whether the chauffeur at the time of the injuries complained of was acting within the scope of his employment. The testimony that he was not so engaged, coming from the defendant and his chauffeur, must be considered as given by interested witnesses, and the jury might have refused to be bound by it; but nevertheless it should have been submitted for their consideration. It may be that it would be wise and in the public interests that responsibility for an accident caused by an automobile should be affixed to the owner thereof, irrespective of the person driving it, but the law does not so provide.

Question 227: (1.) State the facts in this case, the question presented and the Court's decision.

(2.) What rules as to liability did the Court lay down?

(Note: Three justices dissented in the Cunningham case, holding that as the chauffeur had to take the car to the garage, the trip by him was a mere deviation from the route, and that he was still during that trip in the owner's general employ, responsible for the safety of the machine and in seeing it properly housed, and they distinguished between this case and the case of the chauffeur taking the machine out for his own purposes without his owner's permission.)

CHAPTER THIRTY-ONE

RIGHTS OF THE PRINCIPAL AGAINST THIRD PERSONS

- A. Rights of a disclosed principal. B. Rights of an undisclosed principal.

A. Rights of a Disclosed Principal.

Sec. 186. In General.

(Note: If a third person contracts with the principal through the agent, the rights and obligations that ensue are precisely the same as though the contract had been with the principal in person. We need not include any cases to elucidate this apparent truth. We have considered elsewhere the doctrine of *ratification*, by which we noted that a third person may be liable to the principal and the principal to the third person though the agent had no authority at the time, if he contracted in the name of the principal. We also consider elsewhere that a *principal* is not liable on certain contracts made by an agent in his own name. It follows that the principal cannot in that case hold the third person. The liability of the third person to an undisclosed principal remains to be considered.)

B. The Rights of an Undisclosed Principal.

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| § 187. The general rule. | § 190. Exception based on the state of accounts between the third person and the agent. |
| § 188. Exception in case of negotiable paper. | |
| § 189. Exception in case of sealed instruments. | § 191. Exception in case of contract of personal nature with agent. |

Sec. 187. The General Rule.

Case No. 228. Tutt v. Brown, 15 Ky. Reports, 1.

Facts: The facts are stated in the opinion.

Point Involved: The right of an undisclosed principal to sue on the contract.

BY THE COURT, QWSLEY, J.: "George H. Tutt, the son of the plaintiff, Hansford Tutt, whilst in the service of his father, and for his benefit, contracted with the defendant, Brown, to transport in his father's wagon, a quantity of bagging, to Colonel Pearce, near Huntsville, at a stipulated price to be paid by the said Brown; * * * whilst contracting with Brown * * * nothing was said by George H. Tutt about his being employed in the service of his father, nor does it appear that Brown, at that time or for some time after the bagging was transported to Pearce, knew that the service was performed by the son for the benefit of the father.

"Brown failed to pay the said George H. Tutt the price agreed * * * and this suit was brought [by the father].

"On the trial in the court below, after the preceding facts were in substance proved, the jury were instructed by that court, that the plaintiff had no cause of action; but that the right of suit was exclusively in the son, George H. Tutt. Whether or not the court was correct in so instructing the jury, is the only question presented for the decision of this court.

"That, in moral justice, the plaintiff is entitled to the price agreed to be paid by Brown for the transportation of the bagging, is a proposition that none, it is presumed, will pretend to controvert. The service, though performed by George H. Tutt, the son, was not for his own benefit, but for the benefit of the plaintiff, and in justice the plaintiff is most indisputably entitled to the amount which was agreed to be paid by Brown. Being, therefore, entitled to the price, it would seem to follow as a necessary consequence, upon general principles, that

the plaintiff is entitled to maintain an action to recover it; for it is well settled, that as a general rule, the right of property draws with it the right of action. The right of the plaintiff to maintain his action, would be undeniable, if, at the time of contracting for the transportation of the bagging, the son had made known to Brown his true character as agent, and the promise of Brown had been to pay the price to the plaintiff. In that case, the contract of Brown though made with the son, would, in a legal sense, be considered a contract with the father, and of course the father's right to sue for a violation of the promise of Brown, would be unquestionable. But, at the time of making the contract with Brown, the circumstance of the son being in the employment and acting for the benefit of the father, was not made known to Brown; and the question arises, whether or not that circumstance affects the right of the father to maintain his action. The circumstance of the son's failing to disclose his true character certainly does not affect the justice of the father's claim for the price agreed to be paid for the service. If the price had been paid by Brown to the son, the son would be responsible for the amount, and the right of the father to the price must be admitted to be the same before it is paid to the son, that it would be after received by him. By failing to disclose his true character, the son may have imposed upon himself a personal liability to Brown, which he would not otherwise have been subject to; but he cannot have thereby deprived the father of the price agreed to be paid by Brown for transporting the bagging. The right of the father to the price is nevertheless the same, and for a violation of that right by Brown, the law must be admitted to afford him a remedy. The remedy which the law affords does not, however, deprive Brown of any defense which he might have against the demand, considered as belonging to the son; for having contracted with the son without a knowledge of his true character of agent, Brown should be permitted to consider him as principal, so as to allow him to avail himself of any defense to the action

by the principal, that would have been admissible against the claim, if asserted by the son. Thus, in an analogous case, Lord Mansfield observed, 'where a factor, dealing for a principal, but concealing that principal, delivers goods in his own name, the person contracting with him has a right to consider him, to all intents and purposes, as the principal; and though the real principal may appear, and bring an action upon that contract against the purchaser of the goods, yet that purchaser may set-off any claim he may have against the factor, in answer to the demand of the principal.' Paley on Agency, 253.

"It is, therefore the opinion of the Court, that the court below erred in its instructions to the jury, and that the judgment of that court must consequently be reversed with costs, the cause remanded, and a new trial there had."

Question 228: Can a principal recover on contracts made by the agent without disclosing the principal? Why?

Case No. 229. Kingsley v. Siebrecht, 92 Me. 23.

Facts: Suit by an undisclosed principal on a contract in writing and required by the statute of frauds to be in writing. Defense that the plaintiff cannot show by parol evidence that he was the real principal.

Point Involved: Whether or not a contract which is in writing and is required by the statute of frauds to be in writing, made in the name of the agent, may be shown to be the contract of an undisclosed principal.

SAVAGE, J.: " * * * Two questions arise: (1) May the undisclosed principal sue upon a contract made in the name of her agent? and (2) Is it competent for the undisclosed principal to show by parol that the party appearing in the memorandum to be the contracting party was her agent only and contracted in her behalf and thus be enabled to maintain an action on the contract?

"We think both questions must be answered in the affirmative. The authorities are numerous and decisive

that the contract of the agent is in law the contract of the principal and the latter can come forward and sue thereon, although at the time the contract was made the agent acted and appeared to be the principal. * * *

“And the weight of authority, we think, sustains the proposition that in case of a memorandum within the statute of frauds, where the name of the agent only appears, it may be shown by parol who the principal is, in support of an action by the latter.”

Question 229: State this case.

(Note: If the written contract is in language which describes the agent as a principal, it has been held to be contrary to the parol evidence rule to bring in parol evidence to show he is not a principal. Thus in *Humble v. Hunter*, 12 Q. B. (Eng.) 310, the agent contracted as “owner” and it was held the principal could not sue.)

Sec. 188. Exception in Case of Negotiable Paper.

(Note: From the law of negotiable paper we will discover, as we have already noticed, that only party thereto can sue or be sued thereon. Hence an undisclosed principal cannot sue on a negotiable instrument running to the agent. Of course in case of proper negotiation and indorsement to him he could sue thereon.)

Sec. 189. Exception in Case of Instrument under Seal.

(Note: Only a party to a sealed instrument can sue or be sued thereon. No exception is made to this rule in the case of an undisclosed principal.)

Sec. 190. Exception Based on State of Accounts and Equities Between Agent and Third Person.

Case No. 230. *Eldridge v. Finniger*, 25 Okla. 28.

Facts: George C. Eldridge, trading as “Eldridge Coal Co.,” brings suit against Finniger for \$25.30 for coal

sold to Finniger. Finniger admits the debt but claims a set off for \$23.00 for a suit of clothes made by him for Lloyd Eldridge. At the time Finniger bought the coal Lloyd Eldridge was acting and described as "Proprietor" of the Eldridge Coal Co. and Finniger supposed him to be the owner, there being nothing to indicate the contrary. When he ordered the coal he did so on an agreement that Lloyd would order a suit of clothes, which was done, but they were never paid for. Lloyd, as a matter of fact, was merely agent for Geo. C., who now sues as undisclosed principal.

Point Involved: Whether one who deals with another as a principal, who has in fact an undisclosed principal, can set off a claim against such agent when sued by the principal.

TURNER, J.: "* * * If the purchaser of property does not know and has not good reason to know that he is dealing with the agent of the owner, he is justified in treating the agent as owner. * * * In this case it appears, as stated, that defendant dealt with the agent believing him to be the principal and made the contract accordingly. As the principal, by this action, now seeks to enforce said contract, he must take it as the agent and purchaser left it. He must take his pay as the agent agreed to receive it. * * *"

Question 230: State the facts and rule of this case.

Sec. 191. Doctrine Not Applicable to Enforce Obligations of Contract Which Are of Personal Nature with Agent.

Case No. 231. Kelly v. Thuey, 102 Mo. 522.

Facts: Suit by undisclosed principal, James T. Kelly, to compel specific performance of a contract to convey real estate entered into between Richard Thuey and wife, as vendors with D. T. Kelly, as purchaser. The contract provided the purchaser should pay \$950 in cash when

deed delivered and \$664 in three annual installments. James T. Kelly claims to be the real principal.

Point Involved: Whether an undisclosed principal can assert the right to compel the recognition of him as a party to an executory contract involving personal credit (or skill or other personal matter).

BLACK, J.: “* * * This broad doctrine, that when an agent makes a contract in his own name only, the known or unknown principal may sue or be sued thereon, may be applied in many cases with safety and especially in cases of informal commercial contracts. But it is certain it cannot be applied where exclusive credit is given to the agent, and it is intended by both parties that no resort shall be had by or against the principal (Story on Agency, § 160 a) nor does it apply to those cases where skill, solvency or any personal quality of one of the parties to the contract is a material ingredient in it. Now in this case, the written contract is full, complete and formal. It expresses just what the parties thereto intended it should express. * * * To admit parol evidence to show that D. T. Kelly acted as agent of the plaintiff and then substitute or add the plaintiff as a party is simply to make a new contract for the parties. * * *”

Question 231: (1.) State the facts, the question presented and the Court's decision in this case.

(2.) A offered to sell B a horse. B inquired if the horse belonged to C. A said “No.” B said that that being the case he would take the horse, and the bargain was struck. Later, B learns that the horse belongs to C and refuses to take the horse. C sues on the contract. Recover? (*Winchester v. Howard*, 97 Mass. 303.)

(Note: *Accord Cowan v. Curran*, 216 Ill. 598.)

PART VIII

TERMINATION OF THE RELATION OF PRINCIPAL AND AGENT

Chapter Thirty-two. By Agreement of the Parties.
Chapter Thirty-three. By Revocation of Authority.
Chapter Thirty-four. By Operation of Law.

CHAPTER THIRTY-TWO

TERMINATION BY AGREEMENT OF THE PARTIES

§ 192. By the operation of the original agreement. § 193. By subsequent agreement.

Sec. 192. By the Operation of the Original Agreement.

(Note: The agency may terminate because the object is accomplished for which it was created; or because the time elapses during which by the agreement it was to endure. But the employment may be for an indefinite duration, with a right in either party to terminate at any time, either with, or without notice, according to the terms of the contract.)

Sec. 193. By Subsequent Agreement.

(Note: The parties may of course modify their original agreement by a subsequent agreement by which the relation is abandoned. The general law of contracts governs.)

CHAPTER THIRTY-THREE

BY REVOCATION OF AUTHORITY

§ 194. Power to revoke and right to
revoke distinguished.

§ 196. Irrevocable agencies.

§ 197. Notice of revocation.

§ 195. Right to revoke.

Sec. 194. Power to Revoke and Right to Revoke Distinguished.

(Note: See case No. 233, *post*. It is obvious from the cases that a principal has the *power* to revoke, irrespective of the question whether he has the *right*. An exception to this is shown in Sec. 196.)

Sec. 195. Right to Revoke.

(See generally the cases as to the duty of the agent.)

Sec. 196. Irrevocable Agencies.

Case No. 232. Chambers v. Seay, 73 Ala. 372.

Facts: The facts are stated in the opinion.

Point Involved: That powers coupled with an interest or to effectuate a security are irrevocable. To inquire: Whether the power in this case was such a power.

SOMERVILLE, J.: "The main contention in this case involves the right of the principal to revoke the agent's authority to sell, so as to deprive the latter of his commissions.

“The agreement, which is the basis of this suit, is in writing, bearing date February 28, 1878, and is signed by both the plaintiff and defendant. Its substance is briefly as follows: Seay was the owner of a tract of land in Talladega county, valuable for the quantity of iron ore it was known to contain. He placed this land in the hands of Chambers for sale, subject to Seay’s ratification, if he (Seay) should ‘deem the price to be paid for said property sufficient to warrant a sale.’ Chambers, on his part, agreed to undertake the sale of the land, and to this end undertook and promised to transport specimens of ore taken from it to Birmingham, England, for inspection there; and also to advertise the property in one respectable paper in each of the cities of Birmingham and London, England. By way of compensation for his services and expenses, it was stipulated that Chambers should receive ‘an undivided one-fourth interest in the proceeds of sale when sold as aforesaid,’ and his right to sell was made ‘exclusive.’

“The evidence tends to show that Seay revoked the agency of Chambers in January, 1880, and very soon afterwards himself sold the property to one Glidden for the sum of twenty thousand dollars. The circuit court charged the jury, that the agreement in question was a mere revocable agency, which could be recalled by the principal, Seay, at any time before it had been executed by his making a sale of the property; and if it was so revoked prior to the sale made by Seay to Glidden, then Chambers was not entitled to recover any commissions.

“The rule is not denied, that, in ordinary cases, a principal, who has empowered an agent to sell, may at any time before sale revoke the agent’s authority. It is equally true that the usual theory of commissions is, that the agent is to receive them only in the event of success. Wood’s *Mayne on Damages* (Amer. Ed.), §§ 746-747.

“It is argued that the present agreement does not come within this general rule, because it confers on the agent a power coupled with an interest, and that such power is

irrevocable. It is a generally admitted proposition of law, that a principal is not permitted to revoke the authority of his agent, where such authority is coupled with an interest, or where it is necessary to effectuate a security. Ewell's *Evans on Agency*, marg. page, 83. These are the two established exceptions, which seem, indeed, to be essentially similar in principle. It is contended that the agency of the plaintiff, Chambers, comes within the influence of the first exception, as being coupled with an interest, and it was not competent, therefore for Seay to revoke it. It is not any interest, however, that will suffice to render an agency irrevocable. An interest in the proceeds of sale, or money derived from the sale of property by an agent is not sufficient for this purpose. *Barr v. Schroeder*, 32 Cal. 609; *Hartley's Appeal*, 53 Penn. St. 212; *Gilbert v. Holmes*, 64 Ill. 549. To be irrevocable, it seems now well settled, that the power conferred must create an interest in the thing itself, or in the property which is the subject of the power. In other words, 'the power and estate must be united and co-existent,' and, possibly, of such a nature that the power would survive the principal in the event of the latter's death, so as to be capable of execution in the name of the agent. *Blackstone v. Buttermore*, 53 Penn. St. 266; *Bonney v. Smith*, 17 Ill. 531; *Mansfield v. Mansfield*, 6 Conn. 559; *Hunt v. Rousmanier*, 8 Wheat. 174; *Evans on Agency* (Ewell), marg. page, 83, note, and p. 85; *Raleigh v. Atkinson*, 6 M. W. 670. In *Hunt v. Rousmanier*, *supra*, such a power was defined by Chief Justice Marshall to be one 'engrafted on an estate in the thing itself.'

"The power conferred on Chambers was not of this nature very clearly. He had no interest in the subject-matter of his agency, the land itself. He was interested only in the money to be derived as the proceeds of the sale of the land, which could only be realized by the completion of his agency, or by some negotiation which was tantamount to it. He had parted with no money, or other value, for the security of which the power of sale was

conferred in the agreement. He had risked in the venture of his agency only his personal services and the expenses incidental to its execution. The undertaking to transport specimens of iron ore to England, and to advertise the lands there, may be embraced as a part of the ordinary expense to be incurred in the usual course of such an employment. It is fair to presume that he risked this much in view of the large compensation to be reaped as commissions, in the event of a successful sale. *Simpson v. Lamb*, 17 C. B. 603.

“It is insisted further that the agency is rendered irrevocable by reason of the fact, that the power of sale conferred on Chambers was stipulated to be exclusive. This can not be stronger than the use of the word ‘irrevocable,’ which has been construed to fail of such a purpose, unless the agency comes with the exceptions above discussed. In the case of a naked power, an express declaration of irrevocability will not prevent revocation. *McGregor v. Gardner*, 14 Iowa, 326; *Blackstone v. Buttermore*, 53 Penn. St. 266.

“The chief difficulty arises in those cases where the agent has incurred trouble and expense in the execution of his agency, and has been prevented from effecting a sale by the interference of his principal, whether by revocation of his authority, or otherwise. It is not just, it is true, for a principal to revoke an agent’s authority without paying him for labor and expense reasonably incurred in the course of the agent’s employment. Unless otherwise stipulated, the agent may, in a proper form of action, ordinarily claim reimbursement for the value of these. *Evans’ Agency* (Ewell), marg. p. 83-84. So where a sale of property is brought about by the advertisements or exertions of a broker or agent, the broker being the efficient cause of the sale, and the purchaser being found through his instrumentality, he may often recover his commissions. *Sussdorf v. Schmidt*, 55 N. Y. 319; *Earp v. Cummins*, 54 Penn. St. 394. These are mentioned as just qualifications of the general rule, to which we have above adverted, touching the subject

of the revocation of an agent's authority by his principal.

"The pleadings in the present case, upon which it was tried, are framed very clearly with reference to a recovery of the stipulated commissions promised to Chambers, and the gravamen of the action is, in effect, alleged to be the wrongful revocation of the agency by act of the principal. We need not, for this reason, discuss the question as to the plaintiff's right to recover for the value of his services, or for expenses incurred. The first and fifth counts were in *assumpsit*. *Myers v. Gilbert*, 18 Ala. 467. The demurrer for misjoinder was consequently well taken, and was properly sustained by the court.

"The rulings of the circuit court were in accordance with the above views, and its judgment must be affirmed."

Question 232: (1.) What was the power in this case?

(2.) What powers are irrevocable? Suppose in this case the principal had had no *right* to revoke, would that have had any bearing on the question whether the agency was revocable?

(3.) Does the declaration in an appointment that it is irrevocable make it so?

(4.) Would the fact that the agent had gone to expense in the agency, of itself, make it irrevocable?

(5.) A loaned B, \$1,000, and as a part of the same transaction appointed B his agent to collect debts due A, as security for the loan. Could A revoke this authority?

Case No. 233. *McKellop v. Dewitz*, 140 Pac. (Okla.) 1161.

Facts: McKellop and wife, owning certain real estate, gave Dewitz "the sole and exclusive privilege of selling the lots in said addition" at such prices as Dewitz could get, not less than certain prices named. Dewitz undertook on his part "to use his best efforts" and "to give his time and attention to the work of selling such lots." One-half of the expense in selling such lots to be borne by the owners and one-half by the agent, such expenses to include cost of grading streets and alleys, printing of abstracts, etc. The agent also agreed to pay

one-half of the amount necessary to pay a certain note and mortgage of \$3,300 on said premises.

McKellop and wife chose to revoke this agency and bring this suit to quiet their title in said land against Dewitz. Dewitz contends that he has an interest in the agency and that the same is irrevocable.

Point Involved: When is an agency deemed to be coupled with an interest and therefore irrevocable.

Judge: "The assignments of error present the one question as to whether or not the agency created in Dewitz by the written contract was 'an agency coupled with an interest,' and not subject to be revoked by the McKellops at their pleasure. As to this character of agency, the rule is announced by Mr. Mechem in his work on Agency, par. 204:

" 'The authority of the agent to represent the principal depends upon the will and license of the latter. It is the act of the principal which creates the authority; it is for his benefit and to subserve his purposes that it is called into being; and, unless the agent has acquired with the authority an interest in the subject-matter, it is in the principal's interest alone that the authority is to be exercised. The agent obviously, except in the instance mentioned, can have no right to insist upon a further execution of the authority if the principal himself desires it to terminate. It is the general rule of law, therefore, that, as between the agent and his principal, the authority of the agent may be revoked by the principal at his will at any time, and with or without good reason therefor, except in those cases where the authority is coupled with a sufficient interest in the agent.'

"And again the same authority says in paragraph 205:

" 'What interest in the agent will be sufficient to render the authority irrevocable is not easy of exact and comprehensive definition. Certain it is, however, that it is not any interest which will suffice. But it must be an interest or estate in the thing itself or in the property which is the subject of the power; the power and the estate must be united and coexistent, and generally of

such a nature that the power would survive the principal in such a way as to be capable of execution in the agent's name after the death of the principal.'

"And again in paragraph 207 the same authority says:

" 'Thus, where one is given authority to sell the lands or other property of another, and is to have a certain commission or share out of the proceeds for making the sale, the authority may be revoked at the will of the principal, even though in terms it was declared to be exclusive or irrevocable. * * * The interest in the commissions to be earned and in the moneys expended in endeavoring to carry out the agency is not sufficient to present revocation.' * * *

"A careful consideration of the contract clearly shows that no interest in the real estate was conveyed by it to the agent, Dewitz. The terms of the contract do not justify the conclusion that there was any attempt or intention to convey to the agent any part of the title or any distinct interest or estate in the real estate itself. The interest created in or conveyed to the agent was a definite part of the proceeds of sales, an interest in the result—the thing produced by the exercise of the power—and therefore the contract cannot be properly said to be 'a power coupled with an interest.' It is true that, if the agreement had been fully completed, the agent might have claimed under it an interest in that part of the property remaining after a sufficient amount had been sold to satisfy the Beard mortgage; yet this particular interest was contingent and did not vest upon the execution and delivery of the contract. It was not such an interest as the agent could have conveyed in his own name in the event of the death of the principals. It is equally clear that there is nothing in the terms of the contract to justify the claim that it was the purpose or intention of the parties to create a lien on the land in favor of the agent to secure his stipulated contingent commissions, as in *American Loan & Trust Co. v. Billings*, 58 Minn. 187, 59 N. W. 998. The most that can be claimed for this writing is that it was a contract of em-

ployment and that the relation created by it might be terminated at the will of the principal.

“We therefore conclude that the trial court was in error in holding that the contract created in the agent an interest in the property itself and was a ‘power coupled with an interest,’ and therefore irrecoverable by the principal.

“However, it does not follow from this conclusion that the power to revoke the agency was rightfully exercised by the principal. If the power was not rightfully exercised, the principal may be liable to respond in damages for any wrong inflicted upon the agent by the revocation. The contract is silent as to the time the agency or employment should exist, but it is stipulated that the agent should pay certain expenses and give his entire time in accomplishing the purposes of the agency. It is alleged in the answer that the agent had paid out large sums of money under the contract, and that he had faithfully kept and performed each and every part of the contract to be by him kept and performed. If these things are true, he has been damaged by the revocation of the agency, and the principal may be liable to respond in damages. *Cloe v. Rogers*, 31 Okl. 255, 121 Pac. 201, 38 L. R. A. (N. S.) 366. Although the pleadings were not cast, and the case tried upon the theory of the law as announced in *Cloe v. Rogers*, *supra*, we are inclined to the opinion that, when the case gets back in the trial court, permission should be given to amend the pleadings so as to include that theory of the law, if the parties wish to do so.”

Question 233: State the facts in this case and the Court's decision.

Sec. 197. Notice of Revocation.

Case No. 234. *Claffin v. Lenheim*, 66 N. Y. 301.

Facts: Suit brought by Claffin & Co. against L. S. Lenheim for goods alleged to have been bought by Len-

heim, through his brother, H. S. Lenheim, as his agent. Defendant, H. S. L., had one store at Great Bend, Pa., and he conducted another store at Meadsville, Pa., for several years with his brother as the agent in charge, who as such agent had bought goods from plaintiffs for several years prior to July, 1867. Just prior to that date, they sold a bill of goods to defendant at the Meadville store amounting to about \$8,000 and this was paid in August, 1867, but there was a difficulty about the bill and the parties ceased to deal with each other until October, 1869. The store at Meadsville was burned in July, 1867, and defendant admits that the brother had authority before the fire, but claims at about that time it was revoked. In November and December, 1869, the brother made the purchases that are now in controversy, making them ostensibly as the agent of the defendant for the Meadsville store.

RAPALLO, J.: “* * *

“It is a familiar principle of law that when one has constituted and accredited another his agent to carry on a business, the authority of the agent to bind his principal continues, even after an actual revocation, until notice of the revocation is given; and, as to persons who have been accustomed to deal with such agent, until notice of the revocation is brought home to them. The case of such an agency is analogous to that of a partnership, and the notice of revocation of the agency is governed by the same rules as notice of the dissolution of a partnership. As to persons who have been previously in the habit of dealing with the firm, it is requisite that actual notice should be brought home to the creditor, or at least, that the credit should have been given under circumstances from which notice can be inferred.

“* * *

“But the court submitted to the jury the further question whether, independently of the question of notice in fact, the circumstances were such as to put the plaintiffs on inquiry as to whether the authority of the agent con-

tinued, and charged them that if they were, the plaintiffs were charged with notice of the facts which the inquiry would have disclosed. In other words, the question was submitted to the jury whether, although the plaintiffs had no notice in fact, they had constructive notice of the revocation of the agency.

“ * * *

“The mere fact that the store at Meadville was burnt did not indicate that the defendant intended to discontinue business there; and if business had been promptly resumed and purchases for that store renewed by the defendant's brother, there could have been no reason, in the absence of any notice from the defendant, to suppose that the agency had been discontinued. The principal feature in the case is the delay of two years and upwards between the fire and resumption of purchases, by the defendant's brother, for the Meadville store. But, under the circumstances, this delay might well have been attributed by the plaintiffs to the difficulty between them and the defendant, in July and August, 1867, which resulted in the defendant suspending all dealings with the plaintiffs, notwithstanding that he continued his business at Great Bend. And when the defendant, in 1869, resumed his dealings with the plaintiffs, without giving them notice of any change in his business arrangements with his brother, at Meadville, the plaintiffs were warranted in believing that the suspension of the dealings of the brother was attributable to the same cause which had deterred the defendant himself from making purchases; and when, immediately after the defendant himself resumed dealings, the brother applied to make purchases as before, for the Meadville store, the plaintiffs would not, naturally, attribute the suspension of dealings for that store, in the meantime, to a revocation of the agency, nor suspect that the brother was committing a fraud. We must, in considering the portion of the charge excepted to, assume, as we have assumed, that no notice was given by the defendant to the plaintiffs that he had discontinued his business at Meadville or

revoked the authority of his brother, and that the plaintiffs knew nothing of it, for the charge expressly submits the question of constructive notice, independently of the question of notice in fact, and expressly states that the jury are to pass upon it in case they find that there was no notice in fact.

“We think that the circumstances existing at the time of the sale of the goods in question were not sufficient to constitute constructive notice of the revocation of the agency, and that the case should have been submitted to the jury only upon the question of notice in fact. In this there is no hardship upon the defendant; it was his duty, after he had accredited his brother for a series of years as authorized to deal in his name and on his responsibility, when he terminated that authority, to notify all parties who had been in the habit of dealing with his agent, as the plaintiffs had been to his knowledge. This was an act easily performed and would have been a perfect protection to him and prevented the plaintiffs from being deceived. Justice to parties dealing with agents requires that the rule requiring notice in such cases should not be departed from on slight grounds, or dubious or equivocal circumstances substituted in place of notice. If notice was not in fact given, and loss happens to the defendant, it is attributable to his neglect of a most usual and necessary precaution.”

Question 234: What is the rule as to the notice that must be given of the termination of the agency?

CHAPTER THIRTY-FOUR

TERMINATION BY OPERATION OF LAW

- | | |
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| § 198. Death or insanity of principal. | § 200. Destruction or change in subject matter. |
| § 199. Death or insanity of the agent. | § 201. War. |
| | § 202. Bankruptcy. |

Sec. 198. Death or Insanity of Principal.

(See *Yerrington v. Greene*, 7 R. I. 589, set out as Case No. 149, *supra*.)

(Note: An exception to this rule is when the agency is coupled with an interest.)

Sec. 199. Death or Incapacity of Agent.

(See *Yerrington v. Greene*, *supra*.)

(Note: An exception is in case of an agency coupled with an interest.)

Sec. 200. Destruction of or Change in Subject Matter.

(Note: Whether a change in or destruction of the subject-matter renders agency at an end depends entirely on question whether the continued existence of such subject-matter in its present state was impliedly understood by the parties as necessary to a performance of the agency. See the cases on contracts under Impossibility of Performance.)

Sec. 201. Termination by War.

Case No. 235. Insurance Co. v. Davis, 95 U. S. 424.

Facts: Suit on policy of life insurance issued by New York Life Ins. Co. of New York before the war on life of Sloman Davis of Virginia, containing a provision that policy was to be void if premiums not promptly paid. The company's agent in Virginia was one A. B. Garland, who on the outbreak of the war became a Confederate major. After the war the premiums were tendered to him, but he declined to receive them.

Point Involved: Whether war terminates relation of principal and agent between citizens of the hostile powers.

MR. JUSTICE BRADLEY: “* * *

“But we deem it proper to consider more particularly the question of agency, and the alleged right of tendering premiums to an agent, during the war.

“That war suspends all commercial intercourse between the citizens of two belligerent countries or states, except so far as may be allowed by the sovereign authority, has been so often asserted and explained in this court within the last fifteen years, that any further discussion of that proposition would be out of place. As a consequence of this fundamental proposition, it must follow that no active business can be maintained, either personally or by correspondence, or through an agent, by the citizens of one belligerent with the citizens of the other. The only exception to the rule recognized in the books, if we lay out of view contracts for ransom and other matters of absolute necessity, is that of allowing the payment of debts to an agent of an alien enemy, where such agent resides in the same state with the debtor. But this indulgence is subject to restrictions. In the first place, it must not be done with the view of transmitting the funds to the principal during the continuance of the war; though, if so transmitted without the debtor's connivance, he will not be responsible for it.

Washington, J., in *Conn v. Penn*, Pet. C. Ct. 496; *Buchanan v. Curry*, 19 Johns. (N. Y.) 141. In the next place, in order to the subsistence of the agency during the war, it must have the assent of the parties thereto,—the principal and the agent. As war suspends all intercourse between them, preventing any instructions, supervision, or knowledge of what takes place, on the one part, and any report or application for advice on the other, this relation necessarily ceases on the breaking out of hostilities, even for the limited purpose before mentioned, unless continued by the mutual assent of the parties. It is not compulsory; nor can it be made so, on either side, to subserve the ends of third parties. If the agent continues to act as such, and his so acting is subsequently ratified by the principal, or if the principal's assent is evinced by any other circumstances, then third parties may safely pay money, for the use of the principal, into the agent's hands; but not otherwise. It is not enough that there was an agency prior to the war. It would be contrary to reason that a man, without his consent, should continue to be bound by the acts of one whose relations to him have undergone such a fundamental alteration as that produced by a war between the two countries to which they respectively belong; with whom he can have no correspondence, to whom he can communicate no instructions, and over whom he can exercise no control. It would be equally unreasonable that the agent should be compelled to continue in the service of one whom the law of nations declares to be his public enemy. If the agent has property of the principal in his possession or control, good faith and fidelity to his trust will require him to keep it safely during the war, and to restore it faithfully at its close. This is all. The injustice of holding a principal bound by what an agent, acting without his assent, may do in such cases, is forcibly illustrated by Mr. Justice Davis, in delivering the opinion of this Court in *Fretz v. Stover*, 22 Wall. 198. In that case, the agent had collected in Confederate funds the amount due on a bond. Having asserted that the agent had no authority to do

this, the learned Justice adds: 'If it were otherwise, then, as long as the war lasted, every Northern creditor of Southern men was at the mercy of the agent he had employed before the war commenced. And his condition was a hard one. Directed by his government to hold no intercourse with his agent, and therefore unable to change instructions which were not applicable to a state of war, yet he was bound by the acts of his agent in the collection of his debts, the same as if peace prevailed. It would be a reproach to the law, if creditors, without fault of their own, could be subjected to such ruinous consequences.' These observations have a strong bearing upon the point now under consideration.

"What particular circumstances will be sufficient to show the consent of one person that another shall act as his agent to receipt payment of debts in an enemy's country during war, may sometimes be difficult to determine. Emerigon says, that if a foreigner is forced to depart from one country in consequence of a declaration of war with his own, he may leave a power of attorney to a friend to collect his debts, and even to sue for them. *Traite des Assurances*, vol. i, 567. But though a power of attorney to collect debts, given under such circumstances, might be valid, it is generally conceded that a power of attorney cannot be given, during the existence of war, by a citizen of one of the belligerent countries resident therein, to a citizen or resident of the other; for that would be holding intercourse with the enemy, which is forbidden. Perhaps it may be assumed that an agent *ante bellum*, who continues to act as such during the war, in the receipt of money or property on behalf of his principal, where it is the manifest interest of the latter that he should do so, as in the collection of rents and other debts, the assent of the principal will be presumed, unless the contrary be shown; but that, where it is against his interest, or would impose upon him some new obligation or burden, his assent will not be presumed, but must be proved, either by his subsequent ratification, or in some other manner.

“We place our decision simply on the ground that the agency of Garland was terminated by the breaking out of the war, and that, although by the consent of the parties it might have been continued for the purpose of receiving payments of premiums during the war, there is no proof that such assent was given, either by the defendant or by Garland; but that, on the contrary, the proof is positive and uncontradicted, that Garland declined to act as agent.

Question 235: What were the facts in this case and what did the Court hold as to the effect of the war of the agency.

Sec. 202. Bankruptcy.

(Note: Bankruptcy discharges debts mature or immature. It ordinarily does not affect the executory contracts between individuals which are not in the nature of indebtedness.)

DIVISION C

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SALES

DIVISION C

SALES OF PERSONAL PROPERTY

(The outline adopted is that of the Uniform Sales Act, to which reference is freely made and which is printed at the end of this Division.)

- Part IX. Formation of Contract of Sale.
- Part X. Transfer of Property and Title.
- Part XI. Performance of the Contract of Sale.
- Part XII. Rights of Unpaid Seller Against the Goods.
- Part XIII. Actions for Breach of Contract of Sale.

PART IX

FORMATION OF CONTRACT

- | | |
|-----------------------|--|
| Chapter Thirty-five. | Definitions. |
| Chapter Thirty-six. | Capacity of Parties and Formalities of Contract. |
| Chapter Thirty-seven. | Subject Matter of the Contract. |
| Chapter Thirty-eight. | The Price. |
| Chapter Thirty-nine. | Conditions and Warranties. |

CHAPTER THIRTY-FIVE

DEFINITIONS

- § 203. Sales and contracts to sell defined. § 205. Sales distinguished from bailments.
§ 204. Sales distinguished from gifts.

Sec. 203. Sales and Contracts to Sell Defined.

Case No. 236. Uniform Sales Act. Sec. 1.

(See page 585, *post.*)

Question 236: (1.) Define a sale; how does it differ from a contract to sell? If there is a contract to sell and the seller refuses to perform, has the buyer any ownership of the goods? Can he compel performance? What is his remedy?

(2.) A writes to B ordering by general description 100 pianolas of a certain make to be delivered in 90 days on stated terms. B duly accepts the offer. Is this a sale or contract to sell?

Sec. 204. Sales Distinguished from Gifts.

Case No. 237. Bouvier's Law Dictionary, tit. "Gift."

"A gift is the act by which the owner of a thing voluntarily transfers the title and possession of the same from himself to another person, without any consideration. It differs from a grant, sale or bargain in this: that in each of these cases there must be a consideration, and a gift, as the definition states, must be without consideration."

Question 237: A in writing promises B, aged 21, that on B's 25th birthday he will present him with his watch. Suppose that on the 25th birthday A refuses to perform. Has B any rights to the watch or against A? Why?

(2.) Would your answer be different if A had agreed to sell B the watch? Why?

(3.) Suppose that when the 25th birthday arrived, A had said to B: "The watch is yours; I will go to get it," and had then proceeded to the strong-box and had taken out the watch but, before he could hand it to B, had been stricken with apoplexy and died without recovering consciousness. Could B claim the watch?

(4.) Suppose that A had actually given B the watch, would B's title be as good as though B had paid A for it?

Sec. 205. Sales Distinguished from Bailments.

Case No. 238. *Wilson v. Finney*, 13 Johns. (N. Y.) 358.

Facts: In June, 1812, plaintiff, Wilson, delivered to defendant, Finney, six sheep, in consideration whereof Finney agreed to return to plaintiff, at the end of a year, an equal number of sheep, of equal value. Finney neglected to deliver the sheep according to this agreement. It appeared that four of the sheep had been taken (rightfully or wrongfully) from Finney by one of Wilson's creditors, as the property of Wilson. Wilson sued Finney for failing to deliver the sheep according to the agreement and Finney had a judgment below. Wilson appeals.

Point Involved: The distinction between a bailment and a sale.

Per Curiam: "This judgment cannot be supported. There is no color of depriving the plaintiff of a recovery for the value of two sheep, as there is no pretense that more than four were taken under the attachment against him. But the plaintiff was entitled to recover for the whole number. The property in the sheep, delivered by the plaintiff, was changed and duly vested in the defendant. He was under no obligation to return the

same sheep, but only those of equal value. They were at his absolute disposal and risk.

“Judgment reversed.”

Question 238: (1.) Was there a sale of the sheep in this case? Why?

(2.) Suppose the agreement had been that Finney should return the same sheep, and the sheep had been taken by Wilson's creditors or had died without Finney's fault. Would your answer be different? Why?

Case No. 239. *Austin v. Seligman*, 18 Fed. 519.

Facts: Plaintiff delivered to Kempt & Co. certain jewelers' sweepings, of the value of \$4,292, to be refined and agreed to pay for the refining \$320, Kempt & Co.. after the refining, to deliver to plaintiff the product thereof or account for their value. Kempt & Co. did neither. The plaintiff now sues defendant as successor of Kempt & Co., alleging that they assumed the obligation. The question arises under the *pleadings* in this case whether this transaction was a bailment or sale, on the facts stated.

Point Involved: Whether an agreement to return the same goods received, or at the receiver's option to account for their value is a bailment or sale.

WALLACE, J.: “* * * If the delivery of the sweepings was a bailment, trover is an appropriate remedy, because the title to the property remained in the plaintiff, and a demand and a refusal to return it to him by the defendants is sufficient evidence of a conversion, whether defendants were innocent purchasers or otherwise. But the rule is well settled that when, by the terms of the contract under which property is delivered by an owner to another, the latter is under no obligation to return the specific property either in its identical form or in some other form in which its identity may be traced, but is authorized to substitute something else in its place, either money or some other equivalent, the transaction

is not a bailment, but is a sale or exchange. Here, the agreement was that Kempt & Co. should return the refined product of the sweepings or account for their value thereof, less the price for refining. They had an option which was inconsistent with the character of a bailment. *Hurd v. West*, 7 Cow. 752; *Smith v. Clarke*, 21 Wend. 83; *Foster v. Pettibone*, 7 N. Y. 433; *Buffum v. Merry*, 3 Mason 478; *Chase v. Washburn*, 1 Ohio St. 244; *Ewing v. French*, 1 Blackf. 153. *Schouler, Bailm.* 5.

* * *,"

Question 239: (1.) State the facts, the question presented and the Court's decision.

(2.) A delivers to B a large lot of leather to be made into shoes, A to have shoes from the same leather. After the goods are delivered to B, in whom is the title to the leather? B makes up the leather into shoes, and refuses to deliver the shoes to A. Can A (on paying B's proper charges) obtain the shoes? Why?

(3.) Same case except B agrees to deliver shoes out of the same *grade* of leather. What is your answer? What would be A's remedy?

Case No. 240. In re Columbus Buggy Co., 143 Fed. 859.

Facts: The Washburn-Lyle Implement Co. was adjudged a bankrupt, and certain goods were found in its possession which it had obtained under a contract with the Columbus Buggy Co. The trustee in bankruptcy took possession of these goods, claiming them as assets of the bankrupt's estate, and the Columbus Buggy Co. claims them as belonging to it. The trustee's position is that the goods were sold to the now bankrupt under a conditional sale which under the Oklahoma laws is not good as against creditors unless recorded. The Columbus Buggy Co. claims that the bankrupt holds the goods as mere agent or consignee of the Columbus Buggy Co. and that title to said goods never passed conditionally or otherwise, and therefore the transaction was not subject to the conditional sales recording law. The material terms of the contract were that the goods should be selected from those of the Columbus Co. by the Washburn

Co. and should be shipped and billed to it as agent by the Columbus Co. at the latter's wholesale prices, that the Washburn Co. might sell the goods at such prices as it saw fit and that it would pay to the Columbus Co. the wholesale prices less 5% discount for the goods if sold in each month by the 10th day of the succeeding month, that it would keep the goods insured for benefit of the Columbus Co. and would bear all expenses of freight, storage and hauling, that the contract should continue in force one year and that unless it was renewed, the Washburn Co. would, at its expiration return that portion of the goods unsold and the Columbus Co. would repay the freight which had been paid upon this portion and that all goods should be on consignment and the title should remain in the Columbus Co. and subject to its order until they were sold and paid for in cash.

SANBORN, CIRCUIT JUDGE (after reciting the facts):
"A conditional sale is one in which the vesting of the title in the purchaser is subject to a condition precedent, or in which its reversioning in the seller is subject to a failure of the buyer to comply with a condition subsequent.

"An agreed price, a vendor, a vendee, an agreement of the former to sell for the agreed price and an agreement of the latter to buy for and to pay the agreed price are essential elements of a contract of sale. The contract involved in this case has none of these characteristics. The power to require the restoration of the subject of the agreement is an indelible incident of a contract of bailment. *South Australian Ins. Co. v. Randall*, L. R. 3 P. C. 101, 108; 2 Kent's Com. x, 589; *Powder Co. v. Burkhardt*, 97 U. S. 116, 24 L. Ed. 973; *Sturm v. Boker*, 150 U. S. 312, 14 Sup. Ct. 99, 37 L. Ed. 1093. This contract contains a plain stipulation that the goods are at all times subject to the order of the Columbus company until they are sold and that at the expiration of the term of the contract the Washburn company will return the goods which remain unsold. It was therefore a contract of bailment for sale and it was not sub-

ject to the statute of Oklahoma regarding conditional sales. One of the most striking and familiar illustrations of its character is given by Chief Justice Gibson in *McCullough v. Porter*, 4 Watts & S. (Pa.) 177, 39 Am. Dec. 68, where he says:

“ ‘Were I to put my horse in the custody of a friend, to be sold for a designated sum, with permission to retain whatever could be got beyond it, it would not be suspected that I had ceased to own him in the meantime, or that my friend would not be bound to return him, even without a stipulation, should he have failed to obtain the prescribed price.’ ”

“A contract between a furnisher of goods and the receiver that the latter may sell them at such prices as he chooses, that he will account and pay for the goods sold at agreed prices, that he will bear the expense of insurance, freight, storage and handling and that he will hold the unsold merchandise subject to the order of the furnisher discloses a bailment for sale and does not evidence a conditional sale. It contains no agreement of the receiver to pay any agreed price for the goods. It is not, therefore, affected by a statute which renders unrecorded contracts for conditional sales voidable by creditors and purchasers. The fact that such a contract provides that the receiver of the goods may fix the selling prices and may retain the difference between the agreed prices of the accounting and the selling prices to recompense him for insurance, storage, commission and expenses does not constitute the contract an agreement of sale. It still lacks the obligation of the receiver to pay a purchase price for the goods and the obligation of the furnisher to transfer the title to him for that price. *Sturm v. Boker*, 150 U. S. 312, 14 Sup. Ct. 99, 37 L. Ed. 1093; *John Deere Plow Co. v. McDavid* (C. C. A.—) 137 Fed. 802; *Metropolitan Nat. Bank v. Benedict Co.*, 20 C. C. A. 377, 380, 74 Fed. 12, 185; *In re Galt*, 56 C. C. A. 470, 473, 120 Fed. 64, 67; *Union Stock Yards, etc., Co. v. Western Land, etc., Co.*, 7 C. C. A. 660, 664, 59 Fed. 49, 53; *Keystone Watchcase Co. v. Fourth National Bank*,

194 Pa. 535, 45 Atl. 328; *In re Flanders*, 67 C. C. A. 484, 134 Fed. 560; *Martin v. Stratton-White Co.*, 1 Ind. T. 394, 37 S. W. 833; *National Bank v. Goodyear*, 90 Ga. 711, 726, 16 S. E. 962; *Barnes Safe & Lock Co., v. Bloch Bros. Tobacco Co.*, 38 W. Va. 158, 164, 18 S. E. 482, 22 L. R. A. 850, 45 Am. St. Rep. 846; *National Cordage Co. v. Sims*, 44 Neb. 148, 153, 62 N. W. 514; *Rosencranz & Weber Co. v. Hanchett*, 30 Ill. App. 283, 286; *Harris v. Coe*, 71 Conn. 157, 41 Atl. 552, 554; *W. O. Dean Co. v. Lombard*, 61 Ill. App. 94, 97; *Norton & Co. v. Melick*, 97 Iowa, 564, 566, 66 N. W. 780; *Lenz v. Harrison*, 148 Ill. 598, 36 N. E. 567, 569."

Question 240: (1.) Why in this case was it material to determine whether this was a conditional sale or a bailment?

(2.) What did the court decide the transaction was? Why?

Case No. 241. *Lenz v. Harrison*, 148 Ill. 598.

Facts: Harrison sent wagons to Harrington under the following agreement:

"First—The party of the first part has appointed and does appoint the party of the second part to act as his agent for the sale of his wagons in Henry, Illinois.

"Second—The party of the second part hereby undertakes and accepts the said agency, and agrees to the following conditions, viz.: Will pay freight charges, local and general taxes on the wagons, have them properly housed and under cover, and will make good any loss or damage by fire; will pay all expenses whatever; will sell to no person or firm on credit whatever, except such as is of undoubted solvency and financially responsible, and on all time sales which shall not exceed twelve months, will take notes on blanks as enclosed, with interest at the rate of seven per cent. per annum from the date of sale; will endorse all notes, guaranteeing their prompt payment when and where due; will so conduct the business that the time of final payment in Grand Rapids shall not exceed twelve months from date of shipment; will transmit to the office of the party of the first part the

proceeds of each cash sale, or part cash sale, on the day the sale is made or by first mail thereafter; and further, on the last day of every month will make out an account of sales for the current month, and transmit the same, together with all notes, to the office of the party of the first part, and at any time after twelve months from date of shipment, to give his own note for balance of consignment unpaid, on four months, with interest at seven per cent. from date last above mentioned, if so required by party of the first part, but nothing herein shall be construed as amounting to a positive sale without said requirements, and that during the continuance of this contract they will sell no wagons other than

“Third—It is further understood and agreed that the party of the first part will invoice all wagons to the party of the second part at the prices specified on the back of this agreement and that on final settlement of each consignment, all sums over and above such specified prices for which the party of the second part may sell the wagons, shall be allowed to the party of the second part as full commission and other charges more especially enumerated in clause two of this agreement.”

A judgment having been obtained against Harrington in favor of Martin & Co., Lenz, the sheriff, seized the goods in question as the goods of Harrington and this suit is brought against the sheriff by Harrison to recover the goods.

Point Involved: Whether the agreement set out was an agreement of bailment or conditional sale.

CRAIG, J.: “As we understand the contract, when reviewed in all its parts, the wagons were shipped to Harrington to be sold by him as the agent of Harrison. Harrington did not agree to purchase the property, nor did Harrison agree to sell to him. The price of the wagons was specified on the back of the contract, and Harrington was clothed with authority to sell, and retain as his commission whatever sum he might receive over the specified price. The commission over the specified price

was the interest, and the only interest, Harrington had in the property, and whether that would amount to anything depended entirely upon the success he might meet with in making sales. Harrington never gave a note or any other obligation agreeing to pay for the wagons, and by the terms of the contract there was no provision under which he could at any time become the owner of the property.

“It will be observed that in the last part of the second clause of the agreement it is provided that Harrington shall, ‘on the last day of every month, make out an account of sales for the current month, and transmit the same, together with all the notes, to the office of the party of the first part, and at any time after twelve months from the date of shipment, to give his own note for balance of consignment unpaid, in four months, * * * if so required by party of first part.’ This clause it is contended indicates that the transaction was a sale. If this clause was to be considered alone there might be force in the position of counsel, but in the construction of a written contract all the provisions are to be considered together, and from the whole contract arrive at the intention of the contracting parties. A clause in the contract immediately preceding the one relied upon, provides that Harrington will so conduct the business that the time of final payment in Grand Rapids shall not exceed twelve months from the date of shipment. From this clause it is manifest that Harrison wished to compel the sale of a consignment of wagons within one year from the time the wagons were placed in the agent’s hands, and the proceeds should be paid over. Now, the clause holding Harrington liable for any unsold wagons after the year expired, if Harrison required it, was no doubt incorporated into the contract to compel the agent to promptly sell, and report sales within the year from the time he received the wagons.

“*Bastress v. Chickering*, 130 Ill. 206, has been cited as an authority that the transaction is a sale. There are several features of the contract involved similar to the

contract in the case cited. But there is one marked distinction between that case and this one. These notes were given on receipt of the goods, and upon the payment of a note given for any one invoice the consignees were relieved of all further liability as respected that consignment, and the title to the property would vest. The contract in this case contains no such provision. Indeed, we find nothing in the contract, when all its provisions are considered, which can properly be construed in such a manner as to make the transaction a sale."

Question 241: (1.) What did the court decide the transaction in this case constituted? Give some of its reasons.

(2.) What in the Bastress case, was said by the court to distinguish it from this case?

(Note: This case is an extreme case showing the extent to which some decisions uphold the contract even as against creditors where it seems that the transaction was, after all, virtually a sale. The court construes the contract as giving a right in the consignor to have back the same goods if they are unsold, and therefore regards it as a bailment. Compare with next case.)

Case No. 242. Arbuckle Bros. v. Kirkpatrick, 98 Tenn. 221, 36 L. R. A. 285.

Facts: Arbuckle Bros. made a contract with Kirkpatrick & Co. by which they purported to appoint Kirkpatrick & Co. their "special selling factor." It was provided in this agreement that the title to the goods delivered to K. & Co. should remain in A. Bros.; that the goods should be billed to K. & Co. in K. & Co.'s name, "but only as our factors, and according to the laws relating to factors and only at such prices and at such terms as we may give you from time to time;" that K. & Co. should guarantee the sale of each consignment, and the payment thereof, within sixty days from its date and should assume all risk as to the credit of the parties, and should make all collections for goods sold, that K. & Co. should remit the full amount of each consignment less commission by the end of such sixty days at the price designated at the time of the consignment, whether

the whole of said consignment is sold or not, that certain discounts should be allowed on payments in advance, that if the full amount, less commissions, of any consignment should not be paid, A. Bros. would draw on K. & Co. and that certain prices were to be maintained. K. & Co. became insolvent and made an assignment for benefit of creditors. Arbuckle Bros. claim title to all accounts for coffee sold, not yet collected, and moneys held by K. & Co. from accounts collected. No goods are now on hand subject to controversy. The assignee of K. & Co. claims that the contract between A. Bros. and K. & Co. was a contract by which title to all goods delivered thereunder passed on the delivery. A. Bros. claim that K. & Co. were their agents and mere bailees, and not purchasers of such goods.

Point Involved: Whether under the contract set forth title passed to the goods delivered thereunder or whether the sellers thereby retained title, with the consignee as their agent.

WILKES, J.: “* * * Without attempting to run a parallel between the present case and those which have been cited and commented upon, we merely state some of the more prominent features which we think characterize this contract as one of sale, and not of agency. It will be noted that under no circumstances were any goods ever to be returned to Arbuckle Bros. All must be paid for in sixty days, whether sold or not. There is no stipulation to buy at the expiration of sixty days, but the contract clearly contemplates a payment without further bargain, when that time arrives, and implies a present sale, on a credit of sixty days. Kirkpatrick & Co. could sell when and on what time they chose; but no matter how sales were made, the amount to be paid was fixed in advance, whether sold or not, whether collected or not. No account of sales was to be rendered. Arbuckle Bros. had nothing to do with Kirkpatrick & Co.’s customers. They were not in privity with complainants, and no credit was given to them. If cash was

taken, it was not to be kept separate. If notes were taken Arbuckle Bros. had no concern in them. Kirkpatrick & Co. were to have all advance in prices and bear all declines. If the goods were destroyed by fire, wind, or water, it was the loss of Kirkpatrick & Co., and the insurance was optional, and only designed to place them in position to account for the goods. Whether the goods were carted, or stored, or insured was optional with Kirkpatrick & Co., but, in any event, they were to be credited therefor. They were allowed a sum for commissions, whether they sold or not and discount was to be allowed for quick payment, as is usual in case of sales. The course of dealing shows that the proceeds of sale were not to be kept separate, but Kirkpatrick & Co. remitted their check on general account, and it was accepted without question or comment. This was a virtual agreement that Kirkpatrick & Co. might use the proceeds as they chose, and account for them out of their general funds. These features are all evidences of a sale, and cover every risk, obligation, and duty that rests upon a purchaser, and cover every right in handling the goods that an owner could have, except, simply, the price was to be sustained. This was evidently provided in order to keep the price uniform—in all markets and stifle competition. Kirkpatrick & Co. could sell in any territory, in any amount, to any purchaser, on any terms, for cash or credit, take notes or make accounts, and dispose of the goods as absolutely and free of limitation as any owner could, except they could not vary the price. In *Nutter v. Wheeler, supra*, it is said that a stipulation that a vendee or consignee shall not sell below a fixed price is a very common one, made to prevent competition, and has but little weight in determining the question of sale or agency, and is consistent with either.

“We are of opinion that complainants cannot collect from customers of Kirkpatrick & Co., but must look alone to them, and not to purchasers from them; and we are also of opinion that under the peculiar provisions of this contract the relation of complainants to Kirkpatrick

& Co. was that of vendor to vendee, at least as to outsiders, and persons to be affected by the relation, no matter what the parties may have agreed or intended as between themselves. The contract is certainly a remarkable one, partaking in many of its provisions of a contract of agency and in many others of a sale. It is evidently intended as either or both, as might suit the convenience or subserve the purposes of the complainants. It purports to be copyrighted; for what reason is not stated, but the copyright is evidently procured on account of the unusual and extraordinary provisions of the instrument (if there be a copyright). In construing such a contract, whenever it affects the rights of others it will be so construed as to protect such rights and not to enable the complainants to carry out any double purpose. In view of its uncertainty and contradictory provisions, the court will see that third persons are not prejudiced by its construction."

Question 242: What led the court in this case to describe the transaction as a sale?

Case No. 243. Yockey v. Smith, 181 Ill. 564.

Facts: Suit in replevin brought by Smith against Yockey to recover possession of 4,955 bushels of corn and 211 bushels of oats, which had been stored by Smith in the elevators of Robt. T. Harrington, and which Yockey has seized as sheriff under an execution against Harrington. Defense that the grain does not belong to Smith but to Harrington and is therefore rightfully seized. Harrington was a grain dealer at Marseilles, Illinois. He bought, shipped and sold grain on his own account and received grain in store from farmers in his elevators. Smith being the owner of about 3,000 bushels of oats and 5,000 bushels of corn, hauled and stored it in the elevators operated by Harrington, under an agreement that it was to remain his grain, subject to his order, and he was to pay a certain price per bushel for storage. The sale was mixed with grain of the same quality belonging to other depositors.

Point Involved: Whether a deposit of grain in a public warehouse to be stored and mixed with other grain of like quantity, under an agreement that the same or a like quantity of the same kind of grain shall be held subject to the order of the depositor, is a bailment or a sale.

MR. JUSTICE CRAIG: “* * * We think it is plain that the proprietors of public warehouses, such as were kept by Harrington, do not become debtors of the owners of the grain stored, but on the other hand, they are custodians, charged with the duty to restore, in quantity and quality, such grain as they may receive. This rule is demanded for the safety and security of those who entrust their grain to the keeping of persons engaged in the public business of warehouseman. * * *”

Question 243: (1.) If grain is deposited with a public warehouseman, to be mixed with grain of like quality, the same quantity of like grain to remain at the depositor's order, in whom is the title of the grain so stored?

(Note: This rule applies only to goods of a *fungible* character (that is. goods made of units indistinguishable from the units of similar masses) where by custom the goods may be mixed and similar quantities restored. Compare with cases in this chapter, *supra*.)

CHAPTER THIRTY-SIX

CAPACITY OF PARTIES AND FORMALITIES OF CONTRACT

§ 206. Capacity of parties.

§ 208. Statute of frauds.

§ 207. Form of contract of sale.

Sec. 206. Capacity of Parties.

Case No. 244. Uniform Sales Act, Sec. 2.

(See page 585, *post*. See also Cases 2 to 14, *supra*.)

Question 244: Does the Uniform Sales Act change the general law of contracts in this respect?

Sec. 207. Form of Contract of Sale.

Case No. 245. Uniform Sales Act, Sec. 3.

(See page 585, *post*.)

Question 245: What form may the contract of sale take?

Sec. 208. Statute of Frauds.

Case No. 246. Uniform Sales Act, Sec. 4.

(See page 585, *post*. See also Cases 100 to 109, *supra*.)

Question 246: In what way does the Uniform Sales Act change the effect of the 17th section of the original statute of frauds?

(Note: See Cases 100 to 109 in Division I. The value of \$500, or upwards, as provided in the Sales Act, is changed by some of the States which have adopted the Act.)

CHAPTER THIRTY-SEVEN

SUBJECT MATTER OF THE CONTRACT

§ 209. Existing and future goods.

§ 210. Undivided shares.

§ 211. Destruction of goods contracted to be sold.

§ 212. What is included within the subject matter.

Sec. 209. Existing and Future Goods.

Case No. 247. Uniform Sales Act, Sec. 5.

(See page 586, *post*.)

Question 247: (1.) What are "future goods" within the meaning of the Sales Act? May they be the subject matter of a *contract to sell*? Does the act provide that they may be the subject matter of a *sale*?

(2.) May one, by the provisions of the Sales Act, contract to sell goods whose acquisition depends upon a contingency?

(3.) A delivers B a bill of sale purporting to sell goods not yet owned by A. What is the legal effect of this instrument?

Case No. 248. Forsyth Mfg. Co. v. Castlen, 112 Ga. 199.

Facts: Set forth as Case No. 111, *supra*. In addition to the point made with respect to parol evidence, it was contended that the contract was illegal as a sale of future goods. The agreement in this case provided for a future delivery by the purchaser, and a payment by the seller. The words sell, or sale or contract to sell were not used.

Point Involved: Whether a contract to sell goods yet to be acquired by the seller is valid.

COBB, J.: “* * *

“The right of a person to enter into a contract to deliver property not in his possession relying upon making a future purchase in time to fulfil his undertaking was doubted by Lord Tenterden (then Chief Justice Abbott) in *Lorymer v. Smith*, 8 E. C. L. 1, where he took occasion to say that it was a mode of dealing not to be encouraged.

* * * The dictum of Lord Tenterden [was] declared to be unsupported by authority and unsound in principle [in *Hibblewhite v. M'Morine*, 5 M. & W. 462]. * * *

This rule has been generally recognized by the American courts. Mr. Tiedeman says that ‘It may be stated, as the American rule, that *bona fide* contracts for future delivery of goods are not invalid because at the time of the sale the vendor has not in his actual or potential possession the goods which he has agreed to sell.’ *Tied. Sales*, sec. 302, p. 486. ‘A person may make a contract for the sale of personal property for future delivery which is not his at the time. Merchants and traders often do this. A contract for the sale of personal property which the vendor does not own or possess, but expects to obtain by purchase or otherwise, is binding if an actual transfer of property is contemplated.’ *Beach, Mod. Law of Con.*, sec. 1468. * * *

‘A contract for the future delivery of goods is not a wagering contract, when actual delivery of the goods is contemplated by either one or both of the parties.
* * *, , ,

Question 248: What did the Court state in respect to contracts to sell goods not yet in existence, or yet to be acquired by the seller? When, if ever, would such sales be illegal?

Case No. 249. *Low v. Pew*, 108 Mass. 347.

Facts: Alfred Low & Co. bring replevin proceedings to recover a lot of flitched halibut from the assignees in bankruptcy of John Low & Son. On April 17, 1869, John Low & Son being about to sail with the schooner Florence Reed on a fishing expedition, received \$1,500 from Alfred Low & Co. and gave back a writing by which they stated

they did thereby "sell, assign and set over" to Alfred Low & Co. all the halibut that might be caught on the voyage, to be delivered to Alfred Low & Co. as soon as said schooner arrived at the port of Gloucester. In July, 1869, proceedings in bankruptcy were begun in U. S. District Court against John Low & Son, and they were adjudicated bankrupt August 6, and on August 20 the defendants in these replevin proceedings were appointed assignees and the deed of assignment executed to them. On August 14, the Florence Reed arrived home, and on August 16, the U. S. marshal took possession of the vessel and cargo, and turned the same over to defendants on their appointment as such assignees.

Point Involved: Whether the writing by which the voyagers purported to sell fish to be caught on the voyage operated to transfer a title to the fish as caught that defeated a subsequent assignment in bankruptcy made before any of the fish were delivered under such writing.

MORTON, J.: " * * * The schooner which contained the halibut in suit arrived in Gloucester August 14, 1869, which was after the decree of bankruptcy. If there had been a sale and delivery to the plaintiffs of the property replevied, it would have been invalid. The plaintiffs therefore show no title to the halibut replevied, unless the effect of the contract of April 17, 1869, was to vest in them the property in the halibut before the bankruptcy. It seems to us clear, as claimed by both parties, that this was a contract of sale and not a mere executory agreement to sell at some future day. The plaintiffs cannot maintain their suit upon any other instruction, because if there is an executory agreement to sell, the property in the halibut remained in the bankrupts, and, there being no delivery before the bankruptcy, passed to the assignees. The question in the case therefore is whether a sale of halibut afterwards to be caught is valid, so as to pass to the purchaser the property in them when bought.

"It is an elementary principal of the law of sales, that a man cannot grant personal property in which he has no interest or title. To be able to sell property, he must have a vested right in it at the time of the sale. * * *

"It is equally well settled that it is sufficient if the seller has a potential interest in the thing sold. But a mere possibility or expectancy of acquiring property, not coupled with any interest, does not constitute a potential interest in it, within the meaning of this rule. The seller must have a present interest in the property of which the thing sold is the product, growth or increase. Having such interest, the right to the thing sold when it shall come into existence, is a present vested right and the sale of it is valid. Thus a man may sell the wool to grow upon his own sheep, but not upon the sheep of another; or the crops to grow upon his own land, but not upon the land in which he has no interest. * * *

"In the case at bar, the sellers, at the time of the sale had no interest in the thing sold. * * * We are of opinion that they had no actual or potential possession of, or interest in, the fish; * * *. Judgment for the defendants."

Question 249: State the facts, the question presented and the Court's decision in the above case.

(Note: In some states crops are deemed to have no potential existence unless not only the buyer owns the land, but also the crops are planted. *Stowell v. Bair*, 5 Ill. Ap. 104; *Crine v. Tifts*, 65 Ga. 644; *Brown v. Neilson*, 61 Nebr. 765.

The student must not get the impression that if goods have potential or actual existence, a contract for their sale is necessarily a sale. In the vast majority of actual cases it is merely a contract *to sell* in cases of potential existence. But these cases hold that it is possible by apt words to actually *sell* goods which have only potential existence so that on coming into being they *at once*, without further act, belong to the purchaser. Discussing the possible complications arising from such a doctrine, Professor Williston (*Sales*, page 165) says: "For these reasons it is probable that the doctrine would not be carried to its logical limit in many jurisdictions.")

Sec. 210. Undivided Shares.

Case No. 250. Uniform Sales Act, Sec. 6.

(See page 586, *post.*)

Question 250: (1.) Referring to the first paragraph of the above quotation, state the law as therein given.

(2.) See the note following:

(Note: The first paragraph of the above quotation may be thus exemplified: A owning an undivided $\frac{1}{3}$ interest in 20 cords of wood may, while the interest is still undivided, transfer the same to B, who will then own an undivided interest in common with the others with whom A owned the interest. Whether A intended to sell or to contract to sell depends on the language of his agreement.

In the 2nd paragraph another class of cases is referred to. Thus A owns a mass of 200 bushels of wheat. He purports to sell to B a one-third interest. The English cases and one line of American cases hold that B cannot take title until the one-third is identified as his share. This is the law everywhere if the goods are not fungible (there being no intention manifest actually to make the parties owners in common of the whole mass.) But in the case of fungible goods the Uniform Sales Act adopts the rule of one line of American cases, holding that if there is manifest an intention to transfer present ownership, the title may immediately pass, notwithstanding identification of any particular part of the mass is not made.

See the cases under Sec. 226, *post.*)

Sec. 211. Destruction of Goods Contracted to Be Sold.

Case No. 251. Uniform Sales Act, Sec. 8.

(See page 586, *post.*)

Question 251: (1.) A contracts to sell B 500 reaping machines. A has on hand 1,000 machines out of which he expects to fulfill his contract with B, but B has no right to demand any specific machines. The entire 1,000 machines are destroyed by fire. Is the contract avoided? Why?

Sec. 212. What Is Included Within the Subject Matter?

Case No. 252. *Newberry v. The Fashion*, 1 *Newberry*, 67; Fed. Cas. 10,143.

Facts: Suit to recover the value of an ash pan taken from the dock and put into a steamboat. The former owner of *The Fashion*, in 1854, procured this new ash pan, the old one being worn out, making the vessel unsafe. This ash pan was delivered for *The Fashion* at the dock of Oliver Newberry and there remained during the winter of 1854-5, the navigation being closed and *The Fashion* being in dock for the winter. This new pan fitted the vessel, and the old pan was unfit for anything except sale as old iron. Newberry bought *The Fashion* under a bill of sale, transferring the boat, "with her engine, tackle, apparel, furniture and appurtenances." He then sold by similar bill of sale to the present respondent. At the time of this sale the pan was on the dock, and was not expressly included. The engineer of *The Fashion* took possession of it.

Point Involved: What will pass with a sale as appurtenant to the property sold.

WILKINS, DISTRICT JUDGE: " * * * The bill of sale controls the question as to the intention of the parties. It is true that Oliver Newberry bought the vessel without a knowledge of the fact whether or not a new ash pan was necessary and had been procured; but his purchase embraced all that properly appertaining to the vessel, her tackle, her fixtures, and her apparel; and such was clearly the intention of the vendor and vendee when they executed the bill of sale. Had Oliver Newberry remained the owner and fitted out the vessel in the spring, there can be no question but what he would have claimed the ash pan as an appurtenance embraced in the bill of sale—and rightfully too—and his sale to respondents passed all his rights.

Question 252: State the facts, point involved and Court's decision in the above case.

CHAPTER THIRTY-EIGHT

THE PRICE

§ 213. Price defined.

§ 215. Price at valuation by third

§ 214. How price may be determined.

person.

Sec. 213. Price Defined.

Case No. 254. Uniform Sales Act, Sec. 9.

(See page 587, *post*.)

Question 254: Must the price be expressly stated? In what ways may it be left to be determined?

Sec. 214. How Price May Be Determined.

Case No. 255. *Phifer v. Erwin*, 100 N. C. 59.

Point Involved: Whether the price in a contract of sale may by agreement be left to be fixed by some event or contingency.

SMITH, C. J.: “* * *

“The appellants’ counsel insists that, assuming the parties intended a sale, it was ineffectual to pass the property in the goods, by reason of the want of a fixed and agreed price. Such was the rule of the civil law, and Mr. Justice Story, who was most learned in that system of jurisprudence, and an admirer of it, as his valuable works all show, in the copious illustrations drawn from that source, says: ‘It seems to be of the very essence of a sale that there should be a fixed price for the purchase.’ *Flagg v. Mann*, 2 Sum. R., 538.

“But the rule, established by repeated adjudications, is not so rigorous, and the price may be left to be fixed afterwards, by reference to market value, or by a designated person, or in any other way in which it may be ascertained with certainty, and then the sale is effectual, and the price determined; and especially is this so, when the thing is delivered to the purchaser. If nothing is said at the sale and delivery, the sum to be paid is what the goods are reasonably worth. 2 Benj. Sales, 102, 4 Am. Ed., in two volumes. It is only necessary to refer to a definite standard, that the price may be made certain. 1 Parson Cont., 459.

“The only material matter to give effect to a sale, and the transfer of title, is to provide in the contract a definite and sure means of arriving at the sum to be paid, and when this is ascertained, it is the same as if it had been definitely agreed upon at the time of the sale, and the vesting of the property is referable to that time.

“It is otherwise, if the price is left open for future adjustment between the parties, with no agreement, binding on each, as to how the price is to be ascertained, and what it shall be.”

Question 255: (1.) A agrees to deliver and B agrees to accept and pay for a horse at a price to be later agreed on. Is there a sale?

(2.) Suppose the horse was actually delivered under the agreement and kept by B, but no price was ever agreed on. What rights has A?

(3.) A sale at a price to be determined by the market price on a future day. Is there a valid contract?

(4.) A sale between A and B at a price to be determined by C. Is there a contract?

(5.) A sale with no price expressly agreed upon and no way stated by which it can be fixed. Is there a contract?

Case No. 256. Estey Organ Co. v. Lehman, 132 Wis. 144, 11 L. R. A. N. S. 254.

Facts: The facts are stated in the opinion.

Point Involved: Where there is a mistake of price, whether there is a contract. Whether receiving goods

knowing the price which the vendor demands, there having been otherwise no agreement as to price, renders the buyer liable to pay that price.

KERWIN, J.: “* * *

“The purchase of the organ and motor was made by correspondence, and it is established that no price was agreed upon, nor time of delivery fixed upon in such correspondence. It is also established by the evidence that defendants expected to get the organ for \$1,750, while the plaintiff expected to get \$2,300 for it, and understood it was selling it for that price, which was the regular selling price. It is therefore apparent that the minds of the parties never met upon the price before delivery of the organ. It is strenuously insisted, however, by counsel for appellants, that where no price is agreed upon the law will imply one. The argument of counsel would have great force if there was no misunderstanding as to price. But, where no price is agreed upon, and there is a misunderstanding as to price, one party understanding it to be one sum and the other another, the doctrine invoked by counsel for appellants cannot apply. There being a clear misunderstanding as to price, the contract of sale was not complete until the price was agreed upon; and the law could not imply a price contrary to the understanding of the parties. *Harran v. Foley*, 62 Wis. 584, 22 N. W. 837; *Rupley v. Daggett*, 74 Ill. 351. We think it clear that the doctrine that the law will imply the parties intended a reasonable price where no price is agreed upon cannot apply to the case before us. The organ ordered was one of the style and size that plaintiff sold for \$2,300. The organ was shipped on January 22, 1904. On January 25th, the plaintiff mailed a letter, inclosing an invoice of the price, \$2,300 for the organ, and the balance \$101.05 for the motor, making \$2,401.05, the amount sued for. The defendants received this letter January 30, 1904, and replied to it the same day, stating that the plaintiff had made a mistake as to the amount, and demanding that the bill be corrected. Plaintiff re-

plied February 4, 1904, confirming the amount of the invoice. In the ordinary course of mail this letter would reach defendants not later than February 7, 1904. One of defendants left Green Bay February 12, 1904, for Houghton, Michigan, and took the organ from the railroad company at that place and set it up. The defendants having received and retained the property with knowledge of the price plaintiff expected to receive, and without any agreement, express or implied, for a different price, they cannot escape payment of the price stated in the invoice. *Orme v. Cooper*, 1 Ind. App. 449, 27 N. E. 655; *Neidig v. Cole*, 13 Neb. 39, 13 N. W. 18; *Wellauer v. Fellows*, 48 Wis. 105, 4 N. W. 114. The minds of the parties not having met upon the price prior to the time the property was received by defendants at Houghton, Michigan, it was their duty, when they received it with knowledge of the price, to refuse to accept it, unless they were willing to pay the price stated in the invoice. Having taken the property and converted it to their own use, they became liable to pay such price, which the evidence establishes was the regular selling price, and a reasonable price."

Question 256: What was the defense in this case? Did it prevail? Why?

Case No. 257. *S. F. Bowser & Co. v. Marks*, 96 Ark. 113, 32 L. R. A. new series, 429.

Facts: Suit to recover the price of an oil tank and pump. Marks had bought of Bowser & Co. another oil tank and pump of the same make two years previous, at which time the price was \$45. Since that time the price had advanced to \$55.00, at which the article was regularly selling. The defendant did not know of this advance. In ordering the pump nothing was said about price. The tank was promptly shipped, and a statement was mailed showing the price at \$55.00. Defendant refused to receive the goods and reshipped them to the plaintiff who refused to receive them.

Point Involved: Whether the parties are to be deemed to have agreed upon the price, where the buyer is mis-

taken as to price and nothing is said about price, and the seller reasonably assumes that the buyer intends to pay the current price.

FRAUENTHAL, J.: “* * *

“If the parties have agreed to all the other elements of the sale, and have made no reference to the price, then the law will by implication fix the price, which will be what the article is then reasonably worth. A contract not only includes the things said or written, but also terms and matters which, though not actually expressed, are implied by law, and these are as binding as those terms actually written or spoken. * * *

“It is urged by counsel for appellees that there was a mistake in the price made by the parties, and that, on this account, the contract was not assented to by both, and therefore was not effective. It is contended that the appellees understood the price to be \$45, and that appellant understood it to be \$55. It is true that the appellees may have entertained an unexpressed intention to pay only \$45 for the tank and pump. But an agreement is established by the words used, and the law imputes to the parties a meaning corresponding to those words. An unexpressed state of mind of one of the parties cannot effect the agreement as established by the words that are employed. In this case there was no dispute or disagreement about the price, and no misunderstanding by either party thereto. There was simply no references made to the price. It cannot be said, therefore, that there was any mistake made as to the price. The fact that appellees had purchased the same kind of article at a certain price in 1906 could not determine the price thereof in 1908. If they had intended to make the offer of purchase at the price paid in 1906, they should have made an express stipulation in their offer to that effect. Failing to name any price, the law implies that they intended to pay for the oil tank and pump the price that it was reasonably worth; and as to such an article as this, that would be the cur-

rent selling price thereof at the time the offer to purchase it was accepted.

“The Court therefore erred in its declarations of law.

“The judgment is reversed, and the cause remanded for a new trial.”

Question 257: (1.) Is this case distinguishable from the case immediately preceding or is it in conflict therewith on any point?

Sec. 215. Price at a Valuation by Third Person.

Case No. 258. Uniform Sales Act, Sec. 10.

(See page 587, *post.*)

Question 258: (1.) Where the price is left to a valuation of a third person, and he does not fix the price, what is the result?

(2.) Suppose the goods have been delivered to and appropriated by the buyer.

(3.) If either party prevent the fixing of price by such third person, what is the result?

CHAPTER THIRTY-NINE

CONDITIONS AND WARRANTIES

- | | |
|---------------------------------|-----------------------------------|
| A. Conditions and their effect. | D. No warranty to sub-purchasers; |
| B. Express warranties. | their rights in tort. |
| C. Implied warranties. | |

A. Conditions and Their Effect.

Sec. 216. Conditions Defined; Their Effect.

Case No. 259. Uniform Sales Act, Sec. 11.

“(1) Where the obligation of either party to a contract to sell or a sale is subject to any condition which is not performed, such party may refuse to proceed with the contract or sale or he may waive performance of the condition. If the other party has promised that the condition should happen or be performed, such first-mentioned party may also treat the non-performance of the condition as a breach of warranty.

“(2) Where the property in the goods has not passed, the buyer may treat the fulfillment by the seller of his obligation to furnish goods as described and as warranted expressly or by implication in the contract to sell as a condition of the obligation of the buyer to perform his promise to accept and pay for the goods.”

Question 259: (1.) What is the effect of a condition in a contract to sell, or a sale?

(2.) When may a condition be treated as a warranty?

chequer Chamber in 1803. It was there held that an affirmation that the thing sold was a bezoar-stone was no warranty; for it is said, every one in selling his wares will affirm that they are good, or that the horse he sells is sound, yet, if he does not warrant them to be so, it is no cause of action.

“But latterly courts have manifested a strong disposition to construe liberally in favor of the purchaser what the seller affirms about the kind and quality of his goods, and have been disposed to treat such affirmations as warranties when the language will bear that construction, and it is fairly inferable that the purchaser so understood it. *Stone v. Denny*, 4 Met. 155; *Hawkins v. Pemberton*, 51 N. Y. 198. And now any affirmation as to the kind or quality of the thing sold, not uttered as matter of commendation, opinion, nor belief, made by the seller pending the treaty of sale, for the purpose of assuring the purchaser of the truth of the affirmation and of inducing him to make the purchase, if so received and relied upon by the purchaser, is deemed to be an express warranty. And in case of oral contracts, it is the province of the jury to decide, in view of all the circumstances attending the transaction, whether such a warranty exists or not. *Foster v. Caldwell's Estate*, 18 Vt. 176; *Bond v. Clark*, 35 Vt. 577; *Shippen v. Bowen*, 122 U. S. 575.

“But when the contract is in writing, it is for the Court to construe it, and to decide whether it contains a warranty or not. *Wason v. Rowe*, 16 Vt. 525. And by the great weight of recent authority, positive statements in instruments evidencing contracts of sale, descriptive of the kind, or assertive of the quality and condition, of the thing sold, are treated as a part of the contract and regarded as warranties, if the language is reasonably susceptible of that construction and it is fairly inferable that the purchaser understood and relied upon it as such.

“Thus, in *Hastings v. Lovering*, 2 Pick. 214, the sale-note described the article as ‘prime quality winter sperm oil.’ The plaintiff declared in assumpsit on a warranty, and had judgment. In *Henshaw v. Robins*, 9 Met. 83, the

bill of particulars affirmed the article to be indigo. The Court said that that imported an express warranty if it was so intended, and that it must be taken to have been so intended, as there was no evidence to the contrary. In *Brown v. Bigelow*, 10 Allen 242, a case exactly in point, these very words, sound and kind, were held to constitute a general warranty of soundness. In *Gould v. Stein*, 149 Mass. 570 (s. c. 14 Am. St. Rep. 455), a bought and sold note described the article as, 'Ceara scrap-rubber as per sample, of second quality.' The Court said that it did not admit of doubt that the note was intended to express the terms of the sale, and that the contract of the parties was to be found in what was thus written, read in the light of the attendant circumstances. Held, a warranty that the rubber was of second quality, and that the fact that the plaintiff made such examination of it as he pleased, did not necessarily do away with the warranty.

[Here the Court discusses numerous authorities.]

"In *Barret v. Hall*, 1 Atk. 269, the note was payable in 'good cooking stoves.' The Court said that no definite quality could be intended from the term *good*, and that it imported nothing but opinion, and was no warranty, and referred to *Chandelor v. Lopus*, Cro. Jac. 4, for authority, which is no longer authority. But we do not say that the Court was wrong in that case, for good is a very common term of praise in trade, and as used in the note, ascribed no particular quality to the stoves, and might well be regarded in that case as mere matter of opinion or commendation and as so understood by the parties.

"In *Wason v. Rowe*, 16 Vt. 525, the bill of sale said the horse was 'considered sound.' Held, no warranty; and with good reason, for 'considered' was no assertion of a fact, but a mere expression of opinion.

"The more recent cases in this state recognize the general rule that positive statements of fact by the seller in respect of the kind or the quality of the thing sold that constitute a part of the contract or form its basis and that are fairly susceptible of such a construction, are to be regarded as warranties.

“Thus, in *Beals v. Olmstead*, 24 Vt. 114, one of the reasons given why the defendant’s statements ought to be regarded as warranties is, that they were made positively, and concerning matters as to which he was supposed and professed to have knowledge; therefore, it is said, he ought to expect to be bound by them. See also, *Drew v. Ellison*, 60 Vt. 401; *Enger v. Dawley*, 62 Vt. 164.

“It is sufficiently certain as matter of construction that the words ‘sound and kind,’ found in the bill of sale before us, were intended by the parties to be a part of the contract of sale; and as such, it would be unreasonable to construe them as an expression of mere opinion, when they positively ascribe to the horses a condition and a quality that the defendant assumed to know they possessed and that he had peculiar means of knowing whether they possessed or not, while the plaintiff had no such means. We think the words, reading the instrument in the light of the attendant circumstances, clearly constitute an express warranty of soundness, and that the Chief Judge was right in so holding.”

Judgment affirmed.

Question 261: (1.) State the facts, the question presented and the Court’s decision in the above case.

(2.) Give six examples from this case of descriptions that were held to amount to warranties.

(3.) Assume in this case that the seller did not know that the horse had a ringbone. Would he then be considered to have warranted?

(4.) Give two cases here that the Court said were rightfully not considered warranties.

Case No. 262. *Tyler v. Moody & Offutt*, 111 Ky. 191.

Facts: Suit by Tyler for damages caused by explosion of an acetylene gas generator which he alleges that the defendants expressly warranted safe ‘and that no danger or injury would or could result therefrom.’ It is contended that the petition is insufficient in that it does not state that defendants knew that the generator was defective.

Point Involved: Whether in case of a warranty, the seller's knowledge or ignorance of the defect is material.

WHITE, J.: “* * * In Chitty Pl. 137, the author says, that case or *assumpsit* may be supported for a false warranty on the sale of the goods, and that ‘in an action upon the case in tort for a breach of a warranty of goods, the *scienter* need not be laid in the declaration, nor, if charged, would it be proved.’ In the case of *Shiffen v. Bowen*, 122 U. S. 576, 30 L. ed. 1172, 7 Sup. Ct. Rep. 1283, the Supreme Court held that this rule of pleading as stated by Chitty, applied where the action was for breach of an express warranty, and the *scienter* need not be alleged; for if the warranty was expressly made, it made no difference whether the warrantor knew it was false, or did not know whether it was true or false. * * *

Question 262: In case of a warranty by the seller, is the seller's knowledge that his warranty is false necessary to give a right of action for the breach of it?

(Note: The seller's knowledge is essentially important in actions founded on *deceit*. See cases in Contracts. But a warranty is not founded on the seller's intent to deceive, but on his *affirmation of fact* on which the buyer relies. So, in *implied* warranties, knowledge of the defect is immaterial.)

Sec. 219. Affirmation of Fact as Distinguished from Opinion or Prediction.

Case No. 263. *Bain v. Withey & Ottman*, 107 Ala. 223.

Facts: Suit by Withey & Ottman against Bain on promissory notes executed by Bain. Bain defends that plaintiffs represented that they were the owners of a valuable patent right, and that they would sell and convey the same to him, authorizing him to make, sell and lease the right to use said patent in certain counties and further represented that said patent was a useful and beneficial invention; that said plaintiffs fraudulently concealed

from the defendant that said patent was useless and worthless, while in fact said patent was of no value.

Point Involved: Whether the statement by the seller that the thing sold was useful and beneficial, was a warranty.

COLEMAN, J.: “* * * Neither of the pleas set up a statement or representation as having been made by plaintiffs, as to the stability or durability of the fence, or its adaptability as a barrier to hogs, or to the cost of construction, or any fact characteristic of a fence made after the patent. The language of the plea in this respect is, that plaintiffs represented it ‘as a valuable and useful improvement’ but unaccompanied by the statement of any *fact* which rendered it ‘valuable and useful.’ An expression of this character, made with reference to a patented improvement, standing by itself, not emphasizing a material fact, can be but the expression of an opinion, upon which a purchaser has no right to rely; and this is especially true when the patented improvement is constructed and put on exhibition, and the purchaser examines it for himself (citing cases). As stated by Benjamin on Sales, 316, ‘the vendor is at liberty to praise his merchandise, in order to enhance its value, if he abstain from a fraudulent representation of facts, provided the buyer have a full and fair opportunity of inspecting it, and no means are used for hiding the defects.’ A buyer may always protect himself by requiring a warranty of such matters as (to which) he is unwilling to take the risk on his own judgment. * * *”

Question 263: (1.) State the facts in this case, the question presented and what the Court decided.

(2.) What did the Court suggest as statements that would have constituted warranties.

(3.) A sold B wheat, stating that it was “good wheat.” Is this a warranty? (Tex. Star Flour Mill Co. v. Moore, 177 Fed. 744.)

(Note: We will find hereafter that in many sales there is an *implied* warranty of merchantability, fitness for particular pur-

pose, etc. In the cases now considered, assume there is no implied warranty.)

Sec. 220. The Reliance by the Buyer on the Affirmation.

Case No. 264. McCormick v. Kelley, 28 Minn. 135.

Facts: Suit brought against Kelley on a promissory note given to McCormick for part of purchase price of a harvester. Defense, a breach of warranty. The evidence tended to prove that he got the machine before the harvest in 1878, on trial, that he used it to cut about 70 acres of grain but that it did not work well, that he complained about it, but was urged to keep it, and that he then purchased it, relying on defendant's assertions that it was a first class machine and would do good work, but knowing of the defects of which he now complains. The Court instructed the jury: "A vendor may warrant against a defect that is patent and obvious. You sell me a horse, and you warrant that horse to have four legs and he has only three. I will take your word for it." The Court then read from Addison on Contracts: "When a general warranty is given on a sale, defects which were apparent at the time of the making of the bargain and were known to the purchaser cannot be relied on as a ground of action. If one sells purple to another and saith to him 'This is scarlet,' the warranty is to no purpose for that the other may perceive this; and this gives no cause of action to him. To warrant a thing that may be perceived at sight is not good." After reading this quotation the Court then said: "Gentlemen, that is not the law of this state." Defendant had a verdict and judgment, and McCormick now appeals, alleging error in the instructions to the jury.

Point Involved: Whether a general express warranty covers a known defect.

DICKINSON, J.: "* * *".

"The Court erred in these instructions to the jury. It has always been held that a general warranty should not be considered as applying to or giving a cause of action

for defects known to the parties at the time of making the warranty, and both the weight of authority and reason authorize this proposition, viz., that for representations in the terms or form of a warranty of personal property, no action will lie on account of defects actually known and understood by the purchaser at the time of the bargain. * * * In the nature of things one cannot rely upon the truth of that which he knows to be untrue; and to a purchaser fully knowing the facts in respect to the property, misrepresentation cannot have an inducement or consideration to the making of the purchase, and hence could have been no part of the contract.

“It has often been said that a general warranty may cover patent defects, and it has led to some misapprehension of the law. The proposition is strictly true, but, as was said by the court in *Marshall v. Drawhorn*, *supra*, it is ‘confined to those cases of doubt and difficulty where the purchaser relies on his warranty, and not on his own judgment.’ It has no application to the case of a purchaser who knows the defects in the property and the untruthfulness of the vendor’s representations. We do not, however, mean to say there may not be a warranty against the future consequences or results from even known defects.”

Question 264: (1.) State the facts, the question presented and the Court’s decision in the above case.

(2.) What is the reason that a general warranty is not to be considered as covering a known defect?

(3.) A is about to purchase a horse. He notices what appears to him a defect in the horse’s eye, but B, the seller, assures him that the eye is all right, and he will warrant it sound, whereupon A purchases the horse. Can he recover if the eye is unsound?

(4.) A sells B a horse which has a blind eye, and this B could have discovered had he gone out to the barn about 20 feet away, where the horse was standing. He does not, however, and relies on A’s warranty that the horse is sound. Can he recover for the blindness of the eye? (*Thompson v. Bertrand*, 23 Ark. 730 [Sale of a slave warranted to be sound whose unsoundness would have been apparent on inspection].)

Case No. 265. Mitchell v. Pinckney, 127 Iowa, 696.

Facts: Plaintiff purchased of defendant 21 head of cows. He now sues for breach of a warranty that they were sound, alleging that they were afflicted with a contagious disease. The Court on the evidence presented instructed the jury the warranty need not be the sole inducement to the purchase, but that it must have been operative in causing the sale. This instruction is now alleged on appeal as error. It is also claimed as error that there was no positive evidence by plaintiffs that he relied on the warranty.

Point Involved: Whether the warranty must be the sole inducement of the sale. Whether the purchaser has the burden of proof of showing that he relied on the warranty, or where, no evidence to the contrary, his reliance may be presumed.

DEEMER, J.: "But it is said that there is no evidence that plaintiffs relied upon the warranty or representations, or that they induced the sale. The Court instructed, in effect, that the warranty need not be the sole inducement to the purchase, but that it must have been operative in causing the sale. This, of course, is the law. *Rose v. Meeks*, 91 Iowa, 715; *Tewkesbury v. Bennett*, 31 Iowa, 85; *Powell v. Chittick*, 89 Iowa, 513.

"But it is not necessary that proof of reliance thereon be by the positive testimony of the buyer. It is sufficient if, considering all the circumstances, such fact fairly appears. *Case Co. v. McKinnon*, 82 Minn. 75 (84 N. W. 646); *Ormsby v. Budd*, 72 Iowa, 80. Indeed, we have held that where the warranty is a part of the contract of sale, and a part of the consideration of the purchase price, the purchaser need not show by direct evidence that he relied upon it, as the law will presume that he did. *Norris v. Kipp*, 74 Iowa, 444."

Question 265: State how the purchaser may make a prima facie case that he relied on the warranty?

Case No. 266. Smith v. Hale, 158 Mass. 178.

Facts: Alleged breach of warranty on the sale of a buggy, to the effect that it would carry the purchaser and her husband and "a hundred of meal." Three days after the buggy was purchased a spring broke. The seller asked the court to instruct the jury "that where a purchaser inquires for himself, and acts upon his own opinion he cannot say he has been misled by the false statement of another; and if he inspects and examines the articles for himself and selects it after exercising his own judgment upon its character and quality, the vendor only warrants that the article so far as he knows, is what it appeared to be, at the time he sold it." The Court refused to give this instruction and the plaintiff appeals, alleging this refusal as error.

Point Involved: Whether an inspection by the purchaser precludes his reliance upon an express warranty.

ALLEN, J.: " * * * The plaintiff's third request does not contain a correct statement of the law applicable to the case. * * * it is enough to say that a purchaser of an article may examine it for himself and exercise his own judgment upon it and at the same time may protect himself by taking a warranty. The refusal to give the instructions requested was entirely right.
* * *,"

Question 266: (1.) State the facts, the question presented and the Court's decision in the above case.

C. Implied Warranties.

- | | |
|---|---|
| § 221. The implied warranties of title. | merchantability and fitness for particular purpose. |
| § 222. Implied warranty in a sale by description. | § 224. Implied warranties in sale by sample. |
| § 223. The implied warranties of | |

Sec. 221. The Implied Warranties of Title.

Case No. 267. Uniform Sales Act, Sec. 13.
(See page 587, *post*.)

Question 267: (1.) State the implied warranties of title.
(2.) What classes of sellers do not impliedly warrant the goods. Why?

Case No. 268. Porter v. Bright, 82 Pa. St. 441.

Facts: John H. Bright and Benedict sue Anson Porter and others, bankers as Corry Savings Bank, to recover the amount paid by them for certain coupon bonds of the City of Corry, alleged to be counterfeit. The defense set up was that Bright and Benedict bought the bonds with knowledge that they might be defective, that the sellers had made inquiry about the bonds and believed them genuine, but that they refused to sell to plaintiffs until plaintiffs had satisfied themselves that they were all right, that afterwards Bright and Benedict called on defendants and stated they had made inquiry and were satisfied, and that defendants refused to warrant anything except that the bonds had not been stolen.

Point Involved: Whether there is an implied warranty of title where the circumstances show that the seller positively and expressly declared his refusal to warrant title.

MR. JUSTICE SHARSWOOD: “* * *

“We are of opinion that the offer of the defendants below, the rejection of which by the learned Court forms the subject of the first assignment of error, ought to have been admitted.

“That offer was in substance that the defendants did not know the bonds which they offered to sell the plaintiffs to be counterfeit, but supposed them to be genuine; that they stated to the plaintiffs what they had done themselves to ascertain their genuineness; that the plaintiffs must make inquiry and satisfy themselves upon that point, as they would guarantee against nothing except their being stolen, and afterwards the plaintiffs called on the defendants and said that they had made inquiries and were satisfied from what they had heard that they were genuine, and the sale was then made.

“No doubt every vendor of a bond or other instrument

of writing warrants impliedly his title in the same manner as the vendor of any other personal chattel does. If the bond is forged, or its assignment is forged, he has not title, and the vendee can reclaim the price he has paid. It makes no matter whether the vendor knows his title to be bad or not, nor how entirely innocent he may be of any fraud in the transaction. What he has sold proves to be intrinsically worthless. But it would be carrying this doctrine entirely too far to hold that in the absence of concealment or false representation by the vendor, the vendee may not agree to assume all the risk of the title. Why not in the case of the forgery of the instrument as in the case of any other defect of the title, as, for example, that the bond was void for any other reason or that the assignment of it was forged? There is nothing to affect such a contract with illegality."

Question 268: What were the facts, the question presented and the Court's decision in this case?

Sec. 222. Implied Warranty in a Sale by Description.

Case No. 269. Uniform Sales Act, Sec. 14.

"Where there is a contract to sell or a sale of goods by description, there is an implied warranty that the goods shall correspond with the description and if the contract or sale be by sample, as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description."

Question 269: State the implied warranties in a sale by description.

(Note: The phrase "sale by description" has been used to describe two situations: One is that of a sale of an identified article which is described as being of a certain quality, kind, etc. Such were the cases we considered under express warranties to the effect that a description of an article as of a certain quality or kind is a warranty that it is of that kind; in these cases the

description is not used to *identify* the article, as where A sells B a certain horse, described as sound and kind. A different case is presented where A agrees to sell B "102 bales Ceara scrap rubber of the second quality." Here the specific rubber is not before the parties and the description is used for purposes of identification. This is more properly the "sale by description" in which there is the implied warranty that the goods shall be of that description.

When goods, so ordered, are not of the description, but are nevertheless *accepted*, the question arises whether the right to sue for damages is thereby waived. On this there are different views. Case Sec. 273, *post.*)

Sec. 223. The Implied Warranty in a Sale by Description, of Merchantability and Fitness for Purpose for Which Purchased.

Case No. 270. Uniform Sales Act, Sec. 15.

(See page 588, *post.*)

Question 270: (See the following cases.)

Case No. 271. Jones v. Just, L. R. 3 Q. B. 197.

Facts: "The plaintiffs, at Liverpool, entered into a contract with the defendants for the purchase of a quantity of Manila hemp, to arrive from Singapore by certain ships. The ships arrived, and the hemp was delivered to the plaintiffs and paid for; on examination of the bales it was found that they had been wetted through with salt water, and afterwards unpacked and dried, and then repacked and shipped at Singapore. The hemp was not damaged to such an extent as to make it lose its character of hemp; but it was not 'merchantable.' The defendants did not know of the state in which the hemp had been shipped at Singapore. The plaintiffs sold the hemp at auction as 'Manila hemp with all faults' and it realized 75% of the price which similar hemp would have fetched if undamaged." (From headnotes by the reporter.)

Point Involved: Whether there was an implied warranty on the part of the sellers that the hemp was merchantable.

MELLOR, J.: “* * *

“We are of the opinion that there is a great distinction between the present case and the sale of goods in esse, which the buyer may inspect, and in which a latent defect may exist, although not discoverable on inspection.

“The cases which bear upon the subject do not appear to be in conflict, when the circumstances of each are considered. They may, we think, be classified as follows:

“First, where goods are in esse, and may be inspected by the buyer, and there is no fraud on the part of the seller, the maxim *caveat emptor* applies, even though the defect which exists in them is latent, and not discoverable on examination, at least where the seller is neither the grower nor the manufacturer: *Parkinson v. Lee*, 2 East 314. The buyer in such a case has the opportunity of exercising his judgment upon the matter; and if the result of the inspection be unsatisfactory or if he distrusts his own judgment he may if he chooses require a warranty. In such a case, it is not an implied term of the contract of sale that the goods are of any particular quality or are merchantable. So in the case of the sale in a market of meat, which the buyer had inspected, but which was in fact diseased, and unfit for food, although that fact was not apparent on examination, and the seller was not aware of it, it was held that there was no implied warranty that it was fit for food, and that the maxim *caveat emptor* applied: *Emmerton v. Mathews*, 7 H. & N. 586, 31 L. J. Ex. 139.

“Secondly, where there is a sale of a definite existing chattel specifically described, the actual condition of which is capable of being ascertained by either party, there is no implied warranty: *Barr v. Bigson*, 3 M. & W. 390.

“Thirdly, where a known, described and defined article is ordered of a manufacturer, although it is stated to be required by the purchaser for a particular purpose, still, if the known, described, and defined thing be actually supplied, there is no warranty that it shall answer the

particular purpose intended by the buyer: *Chanter v. Hopkins*, 4 M. & W. 399; *Ollivant v. Bailey*, 5 Q. B. 288 (E. C. L. R. vol. 48.)

“Fourthly, where a manufacturer or a dealer contracts to supply an article which he manufactures or produces, or in which he deals, to be applied to a particular purpose, so that the buyer necessarily trusts to the judgment or skill of the manufacturer or dealer, there is in that case an implied term or warranty that it shall be reasonably fit for the purpose to which it is to be applied: *Brown v. Edgington*, 2 Man. & G. 279 (E. C. L. R. vol. 15). In such a case the buyer trusts to the manufacturer or dealer, and relies upon his judgment and not upon his own.

“Fifthly, where a manufacturer undertakes to supply goods, manufactured by himself, or in which he deals, but which the vendee has not had the opportunity of inspecting, it is an implied term in the contract that he shall supply a merchantable article: *Laing v. Fidgeon*, 4 Camp. 169, 6 Taunt. 108 (E. C. L. R. vol. 1). And this doctrine has been held to apply to the sale by the builder of an existing barge, which was afloat but not completely rigged and furnished; there, inasmuch as the buyer has only seen it when built, and not during the course of the building, he was considered as having relied on the judgment and skill of the builder that the barge was reasonably fit for use: *Shepherd v. Pybus*, 3 Man. & G. 868 (E. C. L. R. vol. 42).

“If, therefore, it must be taken as established that, on the sale of goods by a manufacturer or dealer to be applied to a particular purpose, it is a term in the contract that they shall reasonably answer that purpose, and that on the sale of an article by a manufacturer to a vendee who has not had the opportunity of inspecting it during the manufacture, that it shall be reasonably fit for use, or shall be merchantable, as the case may be, it is difficult to understand why a similar term is not to be implied on a sale by a merchant to a merchant or dealer who has had no opportunity of inspection. * * *

Question 271: (1.) What is the rule of *caveat emptor*? When does it apply?

(2.) What were the third and fourth rules given by Justice Mellor?

(3.) What were the facts in *Jones v. Just*, and what did the Court decide?

(Note: This is a leading and well-known case. The classification made by it is fairly accurate, but not entirely so. Thus in the fifth rule, the fact that the buyer had inspected the article bought by the manufacturer would not prevent him from afterwards suing for a latent defect. See the next case.)

Case No. 272. *Nixa Canning Co. v. Lehman, etc., Grocer Co.*, 70 Kan. 664.

Facts: The Canning Co. sold the Grocer Co. a quantity of canned apples. The apples were put up in cans by the Canning Co. for the purpose of selling them to merchants. The sale to this Grocer Co. was by sample, the sample cans being opened and examined by the buyer before the purchase. The samples were apparently sound and fit and were not in fact subject to any defect that could have been discovered by reasonable examination. By reason of certain substances employed in the canning process the apples purchased quickly spoiled. The Grocer Co. sued the Canning Co. for damages.

Point Involved: Whether a manufacturer impliedly warrants that goods sold by him are merchantable.

MASON, J., delivered the opinion of the Court: "The Canning Co. contends that, where goods are sold by sample, there is, in effect an express warranty of conformity to the sample and no other warranty as to quality can be implied. This may be granted to be the ordinary rule as to transactions between merchants, but, where the seller is also the manufacturer, there is an implied warranty that the sample and goods sold are alike free from latent defects not discoverable upon ordinary examination. * * *" The Court then quotes from *Kellogg Bridge Co. v. Hamilton*, 110 U. S. 108: "In ordinary

sales the buyer has an opportunity of inspecting the article sold; and, the seller not being the maker, and therefore having no special or technical knowledge of the mode in which it was made, the parties stand upon grounds of substantial equality. * * * But when the seller is the maker or manufacturer of the thing sold, the fair presumption is that he understood the process of its manufacture, and was cognizant of any latent defect caused by such process and against which reasonable diligence might have guarded. * * * the defendant by implication warranted that the process it employed did not involve the use of any deleterious substance the presence of which could not be detected by any reasonable examination, but which would in a short time render the fruit unfit for food, unmerchantable and worthless.”

Question 272: (1.) State the facts, the question presented and the Court’s decision in this case.

(2.) The A Automobile Co., a manufacturer of automobiles, bought an automobile in exchange for one of its own make. It then sold the second hand machine to plaintiff. The crank shaft broke shortly thereafter from a latent defect. Plaintiff sues for damages and claims that defendant impliedly warranted the merchantability of the car. Can he recover? Why?

Case No. 273. Reynolds et al. v. General Electric Co. et al., 141 Fed. 551.

Facts: Suit by the General Electric Co. for pumps sold and delivered to defendant. Defense a breach of warranty arising out of a latent defect in the material. The General Electric Co. was a manufacturer of electrical machinery, but a mere dealer in the pumps, and defendant knew this.

Point Involved: Whether one who is a dealer and not a manufacturer warrants against latent defects in the manufacture. (See also note following this opinion.)

SANBORN, CIRCUIT JUDGE: “* * *

“It is said that an implied warranty arose from the sale, to the effect that the pump should be fit and proper

for the pumping of water in the shaft of a mine, and that this covenant was broken. If the pump was unfit to do the work which machines of that nature ordinarily perform, that condition arose from latent defects in the material of which it was constructed, or in the workmanship bestowed upon it, of which the plaintiff had no notice. The electric company secured and delivered the article of the known manufacture which the mines company had selected, and which was described in the contract. A manufacturer is charged by the law with notice of latent defects in the design, materials, and construction of the machines he makes which unfit them to perform the ordinary work of such articles, because he furnishes the design, the materials, and the workmanship, and thus either causes or permits the defects. Out of this state of facts and an agreement of sale an implied warranty arises on the part of the manufacturer that the machines he makes are suitable for the general purposes for which such articles are commonly used. *Goulds v. Brophy*, 42 Minn. 109, 112, 43 N. W. 834, 6 L. R. A. 392. But where such a purchaser buys of a dealer a definite machine of known manufacture, which has been, or is to be, made by a builder who is not the vendor, and the vendee knows this fact, there is no implied warranty by the dealer, either against latent defects or that the machine or article will be suitable for the purpose for which such articles are commonly used, because the purchaser has the same knowledge and means of knowledge of these subjects as has the dealer. The vendee knows that they both rely on the character and reputation of the manufacturer. *Bragg v. Morrill*, 49 Vt. 45, 47, 24 Am. Rep. 102; *American Forcite Powder Mfg. Co. v. Brady*, 4 App. Div. 95, 97, 38 N. Y. Supp. 545; *Gardner v. Winter* (Ky.) 78 S. W. 143, 63 L. R. A. 647, 649."

Question 273: State the facts, the question presented and the Court's decision in the above case.

(Note: The cases are in conflict as to whether one who is a mere dealer warrants against latent defects. The case above is

one of a line of decisions holding that a dealer does not impliedly warrant that the goods are merchantable. And that line constitutes the present weight of authority. Another line of cases adopts the contrary view, and that is the doctrine, also, of the Uniform Sales Act, which expressly extends such liability to a mere dealer. Says Professor Williston (Sales, Sec. 233, p. 310): "If the seller of specific goods is neither a manufacturer nor a dealer, generally no warranty of specific goods would be implied, but if the skill or judgment of the seller were evidently relied on, there seems no reason why the nature of the seller's occupation should make a difference, and the Sales Act has adopted this idea."

Case No. 274. Marbury Lumber Co. v. Stearns Mfg. Co., 32 Ky. L. Rep. 739.

Facts: The Stearns Mfg. Co. was engaged in the manufacture of locomotive engines. The Marbury Lumber Co. was engaged in the manufacture of lumber and had at its plant a railroad 17 miles long on which it hauled logs to the mill. Needing an engine to use for this purpose it ordered of the Stearns Co. an engine to do the work required, setting forth in the order the length of the road, gauge of the track, weight of rails, fuel used, weight of train, train mileage per day, number of cars to be hauled, steepest grade, etc. The Stearns Co. accepted the order and delivered an engine pursuant thereto, but it was found inadequate to do the work required of it and finally broke down. The Lumber Co. had given notice of the alleged defects and requested the seller to take back the engine. The engine company brings suit for the balance of the purchase price and defendant sets up its defense and a counter claim.

Point Involved: Whether in a sale of property ordered by the buyer for a particular purpose known to the seller, there is an implied warranty that it is fit for that purpose.

JUDGE HOBSON delivered the opinion of the Court:
" * * * We think the case falls within the following rule as laid down by Benjamin on Sales, § 988; 'where a

manufacturer or dealer contracts to supply an article which he manufactures or produces or in which he deals, to be applied to a particular purpose, so that the buyer necessarily trusts to the judgment or skill of the manufacturer or dealer, there is in that case an implied term of warranty that it shall be reasonably fit for the purpose to which it is to be applied (citing authorities). In such a case the buyer trusts to the manufacturer or dealer, and relies upon his judgment and not upon his own.'

* * * It [the plaintiff] understood precisely what would be required of it and, knowing this, made the engine for the specific purpose for which it was used."

Question 274: State the facts, the question presented and the Court's decision in this case.

(2.) A sold a heating plant to B, to be installed by A in B's house. A put in a heating plant that was well made, but would not heat B's house. B refused to accept the plant. A sues him. Can he recover? (*Ideal Heat. Co. v. Kramer*, 127 Ia. 137.)

Case No. 275. *Grand Ave. Hotel Co. v. Wharton*, 79 Fed. 43.

Facts: The Hotel Co. was a Missouri corporation, owning and conducting a hotel at Kansas City, Missouri. B was a manufacturer of boilers, of whom the Hotel Co. ordered two "Harrison Safety Boilers" of 150 horse power each. The order contained specifications of material and construction. The boilers were duly sent, well-made and of good material, and were set up for use. It was found that the boilers were not available to use with the water from the Missouri river on account of the sediment therein. The Hotel Company contended that as it was known for what particular purpose the boiler was to be used and that it was to be supplied with Missouri river water, there was a warranty that the boilers would be fit for that purpose.

Point Involved: Whether there is an implied warranty of fitness for particular purpose, where the buyer

orders a "known, described and definite" article, and gets what he ordered.

LOCHREN, DISTRICT JUDGE, delivered the opinion of the Court:

"1. Where a manufacturer contracts to supply an article which he manufactures to be applied to a particular use of which he is advised, so that the buyer necessarily trusts to the judgment and skill of the manufacturer, there is an implied warranty that the article shall be reasonably fit for the use to which it is to be applied. (Citing cases.)

"2. But when a known, described, and definite article is ordered of a manufacturer, although it be stated by the purchaser to be required for a particular use, yet if the known, described, and definite thing be actually supplied, there is no implied warranty that it shall answer the particular purpose intended by the buyer. (Citing cases.)

"3. * * *. Here the purchaser contracted for a definite, well-known kind of boiler, its president having then a boiler of the same kind in use. The specifications as to the size, form, material, and every detail were minute, and embodied in the contract. The manufacturers were obligated to deliver exactly such boilers as were described and contracted for, and could not, under the contract, deliver anything different. There is no claim that the boilers did not in every respect conform to this contract and specifications, nor any claim that they were defective, either in respect to workmanship or material. The purchaser did not exact a warranty that the boilers would operate with the muddy waters of the Missouri river, and therefore assumed that risk itself."

Question 275: (1.) What were the facts in this case, the question presented and the Court's decision?

(2.) What is the difference between this case and the case immediately preceding? Why?

(3.) Do you think there were any implied warranties in this case? What?

Case No. 276. Peoria, etc., Co. v. Turney, 175 Ill. 631.

Facts: See the opinion.

Point Involved: Whether there is an implied warranty of fitness for particular purpose where goods are ordered by trade name.

MR. JUSTICE PHILLIPS delivered the opinion of the Court: “* * * It is also urged that the words ‘Reed City Lump Coal’ in the contract, raised an implied warranty of the quality of the coal. * * * These words designated a certain kind of coal known in commercial trade and with which appellant was familiar, as it had used it prior thereto. Therefore, it having contracted for that kind of coal, if it received what it contracted for there was no implied warranty. The common law is tersely stated in the English ‘Sale of Goods Act,’ under Rule 14, ‘that in the case of a contract for the sale of a specific article under its patent or other trade name there is no implied contract as to its fitness for any particular purpose for the reason, as stated in the authorities that ‘an undertaking as to fitness is not implied where the buyer gets what he bargained for.’ (Citing cases.)”

Question 276: State the facts, the question presented, the Court’s decision in the above case and the reasons therefor.

Case No. 277. Wiedeman v. Keller, 171 Ill. 93.

Facts: Defendant is a retail dealer in meats. Plaintiff called at his place of business and purchased a quantity of pork to be used in her family. The pork turned out to be unwholesome and unfit for use, making plaintiff and her family sick. Defendant did not know that the meat was unwholesome. Plaintiff sues for damages.

Point Involved: Whether in a sale of goods by a dealer for purposes of immediate consumption, there is a warranty that it is fit for consumption.

MR. JUSTICE CRAIG delivered the opinion of the Court: “As a general rule, we think the decided weight

of authority in the United States is, that in all sales of meats or provisions for immediate domestic use by a retail dealer there is an implied warranty of fitness and wholesomeness for consumption. * * * In this case * * * the appellee was a regular retail dealer, and as such he sold the meat to appellant for domestic use, and under the law as it seems to be settled in this country, as the meat turned out to be unwholesome, he was liable, although he was not aware that it was diseased when he sold it to appellant.

“In an ordinary sale of goods the rule of *caveat emptor* applies, unless the purchaser exacts of the vendor a warranty. Where, however, articles of food are purchased from a retail dealer for immediate consumption, the consequences resulting from the purchase of an unsound article may be so serious and may prove so disastrous to the health and life of the consumer that public safety demands that there should be an implied warranty on the part of the vendor that the article sold is sound and fit for the use for which it was purchased. It may be said that the rule is a harsh one; but, as a general rule, in the sale of provisions the vendor has so many more facilities for ascertaining the soundness or unsoundness of the article offered for sale than are possessed by the purchaser, that it is much safer to hold the vendor liable than it would be to compel the purchaser to assume the risk. * * *

Question 277: State the facts, the question presented and the Court's decision in this case.

(2.) A, not a dealer in meats, was leading a cow down the street to pasture. B made an offer for the animal. A accepted and B led the cow away. A knew that B wanted the cow to butcher, but did not know the cow was diseased, which turned out to be the fact, so that the meat had to be thrown away. A sues for the price of the cow. Has B any defense?

Sec. 224. Implied Warranties in Sales by Samples.

Case No. 278. Nixa Canning Co. v. Lehman, etc., Grocer Co.

(Set out as Case No. 272, *supra*.)

Case No. 279. Hanson v. Busse, 45 Ill. 497.

Facts: They are stated in the opinion.

Point Involved: What constitutes a sale by sample.

MR. JUSTICE LAWRENCE delivered the opinion of the Court, wherein the facts are stated: “* * * But the rule itself must be considered firmly settled in the common law, that the vendor of goods which the purchaser has at the time of purchase, the opportunity of examining, is not responsible for defects of quality, in the absence of fraud and warranty. * * *

“In the case before us the proof shows that the 110 barrels of apples were piled up in tiers at a railway depot in Chicago. The purchaser went with the clerk of the plaintiffs to look at them. They opened a couple of barrels that stood on the floor. The purchaser was lame from rheumatism and requested the clerk to climb up and open a barrel on the top of the tiers. He did so, and showed the defendant some apples which were in good condition, *and said they were all like that.* * * * The apples in the three barrels *exhibited as samples* were unquestionably merchantable, or the defendant would not have bought. It would be unreasonable to require that he should have opened every one of the 110 barrels. He had a right to rely on the samples shown to him, and on the representations of the plaintiffs that the apples were good.”

Question 279: State the facts, the question presented and the Court's decision in this case.

Case No. 280. Bierne v. Dord, 5 N. Y. 95.

Facts: Bierne and Burnside bought of defendant, Dord, a quantity of French blankets. The blankets were wrapped up in bales, and the sale was made at New York in the warehouse at which the blankets were. Two or three pairs of the blankets were exhibited at the time and examined by the purchaser and found to be sound. Nothing was said by either of the parties about the con-

dition of the other blankets, which could have been examined by the purchaser had he desired to inspect them. Defendant's clerk, who made the sale, testified on the trial that the blankets exhibited were taken promiscuously from the bales and that he supposed all of the blankets would correspond with them. Plaintiffs purchased twenty-seven bales which were put by plaintiffs' direction on board a vessel bound for New Orleans and paid for by plaintiffs. The blankets were in fact largely moth eaten. The plaintiffs sue for damages, alleging breach of warranty and had judgment below. Defendant appeals.

Point Involved: Whether the exhibition of the blankets under the circumstances and in the manner stated, made the sale a sale by sample.

JEWETT, J.: “* * * As a general rule, it is well established, as well by our law as by the common law, that where there is neither fraud nor express warranty on the executed contract for the sale of a chattel, the buyer takes the risk of its quality and condition. * * *

“There is, however, an exception * * * which allows a warranty to be implied on a sale of goods by sample, that the article is, in bulk, of the same kind and equal in quality with the sample exhibited, in reference to which the parties contracted. When a contract for the sale of goods is made by sample it amounts to an undertaking on the part of the seller, with the purchaser, that all the goods are similar both in nature and quality to those exhibited. * * *

“But the mere circumstance that the seller exhibits a sample, at the time of the sale, will not of itself make a sale by sample, so as to subject the seller to liability on an implied warranty as to the nature and quality of the goods; because it may be exhibited, not as a warranty that the bulk corresponds to it, but merely to enable the purchaser to form a judgment on its kind and quality. If the contract be connected by the circumstances attending the sale, with the sample, and refer to it, and it be

exhibited as the inducement to the contract, it may be a sale by sample; and then the consequences follows, that the seller warrants the bulk of the goods to correspond with the specimen exhibited as a sample. Whether a sale be a sale by sample is a question of fact for the jury to find from the evidence in each case; and to authorize a jury to find such a contract * * * the evidence must be such as to authorize the jury * * * to find that the sale was *intended* by the parties as a sale by sample. * * *

“That a personal examination of the bulk * * * is not practicable or convenient, furnishes no sufficient ground, *of itself*, to say that the sale is by sample * * * (such) is doubtless a strong fact in reference to the question of the character of the sale, whether it was or was not made by sample. * * *

“New trial granted.”

Question 280: (1.) State the facts, the question presented and the Court’s decision in this case.

(2.) How does this case differ in principle from the case immediately preceding it?

(3.) Suppose, in this case, the seller had called on the buyer with a French blanket and exhibited it as the sort of blanket he desired to sell to the purchaser, the other blanket not being present for inspection. Would there have been a sale by sample?

D. No Warranty to Subpurchasers; Their Rights in Tort.

Sec. 225. The Nature of a Seller’s Liability to Others than the Purchaser.

Case No. 281. *Lebourdais v. Vitrified Wheel Co.*, 194 Mass. 341.

Facts: This was an action by Lebourdais for personal injuries sustained by him on account of the bursting of an emery wheel manufactured by defendant, and bought by plaintiff’s employer of a dealer to whom it had been sold by the defendant.

Point Involved: Whether the liability for selling a defective article extends to other persons than the immediate purchaser.

BRALEY, J.: "The manufacturer of an article of merchandise which he puts upon the market ordinarily is not responsible in damages to those who may receive injuries caused by its defective construction, but to whom he sustains no contractual relations, although by the exercise of reasonable diligence he should have known of the defect. If such an extended liability attached where no privity of contract exists it would include all persons however remote who had been damaged either in person or property by his carelessness, and manufacturers as a class would be exposed to such far reaching consequences as to seriously embarrass the general prosecution of mercantile business. In the usual course of trade upon making a sale, as the article passes from the ownership and control of the maker, it is held that when these cease his liability also should be considered as ended. *Davidson v. Nichols*, 11 Allen, 514; *Clifford v. Atlantic Cotton Mills*, 146 Mass. 47, 48; *Glynn v. Central Railroad*, 175 Mass. 510, 512. But where by reason of its nature the article sold is commonly recognized as intrinsically dangerous to life or property, among which gunpowder, nitroglycerine and other highly explosive compounds, naphtha and poisonous drugs are some familiar examples, if the seller without notice of their dangerous or noxious qualities delivers them to a customer or to a carrier who is ignorant of these properties, he is liable not only to him, but to others to whom while in the exercise of reasonable care they are the proximate cause of injury. *Davidson v. Nichols*, 11 Allen, 514; *Carter v. Towne*, 98 Mass. 567; *Wellington v. Downer Kerosene Oil Co.*, 104 Mass. 64; *Norton v. Sewall*, 106 Mass. 143; *Boston & Albany Railroad v. Shanly*, 107 Mass. 568; *Turner v. Page*, 186 Mass. 600; *Oulighan v. Butler*, 189 Mass. 287, 292; *Flynn v. Butler*, 189 Mass. 377, 388; *Thomas v. Winchester*, 2 Seld. 397. A similar liability

exists where a caterer furnishes impure and unwholesome food by which the guests of his customer are made sick, or where a manufacturer or vendor knowingly sells for general use, without disclosing the existence of the defect, a machine, mechanical instrumentality or other article, which because of its defective construction or condition when put out causes injury. *Bishop v. Weber*, 139 Mass. 411, 417; *McDonald v. Snelling*, 14 Allen, 290; *Flynn v. Butler*, 189 Mass. 377; *Lewis v. Terry*, 111 Cal. 39; *Huset v. Case Threshing Machine Co.*, 120 Fed. Rep. 865; *Clarke v. Army & Navy Co-operative Society*, (1903) 1 K. B. 155, 167. In all of these various transactions his liability does not rest on privity of contract, but the act itself is deemed not only a legal wrong, but may be said to be in violation of the duty he owed to those with whom he dealt, as well as of the implied duty which he owes to the community to refrain from the commission of acts of negligence whereby injury follows to its members in person or property. If damages are suffered he is responsible because they are such as reasonably should have been foreseen, though the exact way in which the accident is precipitated may be determined by a foreign cause. *McDonald v. Snelling*, *ubi supra*; *Flynn v. Butler*, *ubi supra*; *Huset v. Case Threshing Machine Co.*, *ubi supra*; *Lane v. Cox*, (1897) 1. Q. B. 415, 417. It is within the last exception, if the plaintiff has a right of action against this defendant, that there it must be found." [The Court held that the plaintiff did not properly state his case in his pleadings, to give him a right of action.]

Question 281: (1.) If A sells to B and expressly or impliedly warrants merchantability of the article sold, and B resells to C, can C sue A on the warranty? or assuming that a warranty does not run to B, can it be construed to run to C?

(2.) On what theory or theories can a subpurchaser, or any person other than the immediate vendee recover?

(3.) A sues M, declaring that M knowing that one B was a retailer of fluids to be burned in lamps for illuminating purposes, and knowing that naphtha was explosive and dangerous for such use, sold and delivered naphtha to B knowing that B

intended to retail it in his business, and that B, in ignorance of its dangerous qualities, retailed a pint of such naphtha to A to be burned in his lamp for illumination, and that the plaintiff, in like ignorance, used the fluid and was burned. Can A recover against M? (*Wellington v. Downer Kerosene Oil Co.*, 104 Mass. 64.)

(4.) A, druggist, negligently labeled a deadly poison as a harmless medicine, and sold it to dealers who retailed it to their customers. State right of customers to sue A? To sue retailers? (*Thomas v. Winchester*, 2 Seld. 397.)

(5.) A, a painter, purchased of M, a manufacturer of step-ladders, and such ladder, in use by B, one of A's employes, broke from a defect caused by M's negligence, and precipitated B to the ground, injuring him. Can B recover against M? (*Schubert v. J. R. Clarke Co.*, 49 Minn. 331.)

(6.) Plaintiff bought a coat from Young Bros., his local dealers, who bought it from the B. & S. Company, wholesalers, who knew that the fur collars of such coats contained dyes that sometimes poisoned the skin of some wearers, but were worn with safety by others. Plaintiff, who sustained poison by wearing such coat, sues the B. & S. Co. in tort. Can he recover? (*Gerkin v. Brown & Sehler Co.*, 143 N. W. (Mich.) 48.)

(7.) Plaintiff purchased a bottle of Malt Nutrine from a druggist, who procured it from a wholesaler, who procured it from the manufacturer, who advertised it as wholesome. The liquor was contaminated and plaintiff's wife was made sick and his young son died. Can plaintiff recover against the manufacturer on theory of broken warranty? on theory of tort? (*Roberts v. Anheuser-Busch Brew. Ass'n*, 98 N. E. (Mass.) 95.)

(Note: See a collection of authorities in *Huset v. Case Threshing Machine Co.*, 120 Fed. Rep. 865.)

PART X

TRANSFER OF TITLE

- Chapter Forty. Transfer of Title as Between Buyer and Seller.
Chapter Forty-one. Transfer of Title as Affecting Third Persons.
Chapter Forty-two. Documents of Title.

CHAPTER FORTY

TRANSFER OF TITLE AS BETWEEN BUYER AND SELLER

- A. Rules governing transfer of title. C. Transfer of title in auction sales.
B. Reservation of title by means of documents of title. D. Risk of loss.

A. Rules Governing Transfer of Title.

- § 226. Title to unascertained goods cannot be transferred. § 230. Same subject: sale or return or sale on approval.
§ 227. Title to ascertained goods passes according to parties' intention. § 231. Same subject: upon appropriation of unascertained goods.
§ 228. Rules determining intention; title is presumed to pass when contract made. § 232. Same subject: seller to deliver at particular place.
§ 229. Same subject: seller to put goods in deliverable state.

Sec. 226. Title to Unascertained Goods Cannot be Transferred.

Case No. 282. Hahn v. Fredericks, 30 Mich. 223.

Facts: Fredericks sued Hahn to recover the price of certain wood, which was destroyed by fire before it had

been withdrawn by the purchasers. The wood bargained for was 200 cords of hard wood out of a pile of between 350 and 400 cords in which was scattered a small amount of soft wood. The wood was all piled in tiers on Portage lake, the six rows nearest the lake containing about 201 cords in which there were 11 or 12 cords of soft wood. A fire destroyed the wood before there was any selection. Plaintiffs sue for the purchase price on the theory that title had passed to Hahn before the fire, and the loss was therefore his.

Point Involved: Whether title can pass before the goods that constitute the subject of the sale are specifically ascertained.

CAMPBELL, J.: “* * *

“The principal question in the case seems to be, whether the sale actually attached to any two hundred cords which could be identified before the fire.

“It is not claimed, and there is nothing to warrant the notion, that the contract was intended to be severable, or to attach to anything less than two hundred cords of hard wood, and of no other wood. There was no sale of the first six piles as they stood, or of the hard wood in the first six piles, independent of so much more as would fill up the measure.

“Until an actual measurement, which was to be made when the hard wood was removed from the piles and as it was placed on the scows, it is evident that there could be no parcel identified to which a sale could attach as complete. It was a bargain for a parcel yet to be measured out of a larger parcel of various qualities, and of an extent not determined. The original measurement was, under this contract, of no importance.

“We have found no authority which recognizes such a transaction as a completed sale. It was not a sale in gross of an entire parcel of wood, where the measurement was only necessary to ascertain the quantity, as in *Adams Mining Co. v. Senter*, 26 Mich. 73. Here the measurement was necessary to complete the identifica-

tion, and to determine what wood was to belong to the purchaser. Under such an arrangement it is well settled that no title passes to any portion of the property until it has been measured and thus identified and severed from the rest. *Dunlap v. Berry*, 4 Scam. 327; *Court-right v. Leonard*, 11 Iowa, 32; *Young v. Austin*, 6 Pick. 280; *Merrill v. Hunnewell*, 13 Pick. 213; *Mason v. Thompson*, 18 Pick. 305; *Scudder v. Worster*, 11 Cush. 573; *Simmons v. Swift*, 5 B. & C. 857; *Rugg v. Minett*, 11 E. 210; *Shepley v. Davis*, 5 Taunt. 617."

Question 282: (1.) State the facts, the question presented and the Court's decision in this case.

(2.) A sold B a quantity of shingles to be selected out of a large mass, B to make the selection. Before B had selected the shingles, B's creditors had a levy made on the quantity sold. A sues the sheriff making the seizure for interfering with his property. Will the action lie? (*Goldberg v. Bussey*, 47 S. W. (Tex.) 49.)

Case No. 283. Uniform Sales Act, Sec. 17.

(See page 589, *post*.)

Question 283: What is the provision of this section of the Sales Act?

Case No. 284. *Kimberly v. Patchin*, 19 N. Y. 330.

Facts: One Dickinson had in a warehouse two piles of wheat, amounting to 6,249 bushels. John Shuttleworth proposed to purchase 6,000 bushels of the wheat and a memorandum was made out to that effect and the wheat was left undisturbed in the warehouse. Shuttleworth then sold the wheat to Patchin. Dickinson then sold the two piles of wheat to a person from whom Kimberly derived his claim of title. Patchin then got possession of the wheat and Kimberly sues him for damages, on the theory that Shuttleworth, whatever contract he might have had, never had title, as the 6,000 bushels were never ascertained and that title therefore could not be passed to Patchin.

Point Involved: Whether title to goods of a fungible nature can pass before the particular goods are ascertained out of a larger mass owned by the seller, the parties intending to actually transfer title.

COMSTOCK, J.: “* * * When Shuttleworth bought the 6,000 bushels, that quantity was mixed in the storehouse with the excess and no measurement or separation was made. The sale was * * * precisely of 6,000 bushels. On this ground it is claimed, on the part of the plaintiffs, that in legal effect the contract was executory, in other words, a mere agreement to sell and deliver the specified quantity, so that no title passed by the transaction. It is not denied, however, * * * that the parties *intended* a transfer of title. The argument is and it is the only one which is plausible, that the law overrides that intention. * * *

“It is a rule * * * that in order to make an executed sale, so as to transfer a title from one party to another, the thing sold must be ascertained. This is a self-evident truth when applied to those subjects of property which are distinguishable by their physical attributes from all other things and therefore are capable of exact identification. No person can be said to own a horse or a picture unless he is able to identify the chattel, or specify what horse or what picture belong to him. * * *

“But property can be acquired and held in many things which are incapable of such identification. * * * Of this nature are wine, oil, wheat and other cereal grains, and the flour manufactured from them. * * * Where the quantity and the general mass from which it is to be taken are specified, the subject of the contract is thus ascertained, and it becomes a possible result for title to pass, if the sale is complete in all its other circumstances. * * *

“We are of opinion, therefore, both upon authority and clearly upon the principle and reason of the thing

that the defendant under the sale to Shuttleworth, acquired a perfect title to the 6,000 bushels of wheat.

* * *

(Note: There are two lines of cases which hold opposite views in sales of parts of homogeneous masses, one line holding that title cannot pass until separation, though the intention of the parties might have been to pass title, because it is impossible to say what particular part the buyer owns. The leading authority for this doctrine is perhaps *Scudder v. Worster*, 11 Cush. 573. The other doctrine, whose leading authority is the case above, is sufficiently therein stated. It seems the more sensible doctrine though the weight of authority seems against it. The Uniform Sales Act, however, adopts it and it is probably gaining ground. It is hardly necessary to say that such a doctrine can only refer to sales of part of a homogeneous or fungible mass.)

Question 284: State the doctrine of the above case.

(2.) A has a lot of logs on his place, numbering about 5,000. He "sells" to B 1,000 of the logs. Before any selection is made, in whom is the title? Why?

Sec. 227. Title to Ascertained Goods Passes According to the Parties' Intention.

Case No. 285. Uniform Sales Act, Sec. 18.

"(1) Where there is a contract to sell specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

"(2) For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties, usages of trade, and the circumstances of the case."

Question 285: When there is a contract to sell specific or ascertained goods, state by general terms when title will pass.

Sec. 228. Rules Determining Intention: That Title Is Presumed to Pass When Contract Is Made.

Case No. 286. Uniform Sales Act, Sec. 19, Rule 1.

“[Unless a different intention appears.] Where there is an unconditional contract to sell specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment, or the time of delivery, or both, be postponed.”

Question 286: Under what circumstances is title presumed to pass when the contract is made? Is this a rule of law or a presumption of fact?

Case No. 287. Rail v. Little Falls Lumber Co., 47 Minn. 422.

Facts: The following contract was made:

“I, Case Rail, hereby sell to the Little Falls Lumber Co., 247 logs, marked ‘C. R.’ and stamped ‘C. R.’ and scaling 60,300 feet, at \$7.00 per thousand feet, to be delivered by me in the Mississippi River, the same being now, etc. Payments to be made as follows (setting forth certain installments).” Part of these logs were destroyed by fire before delivery. Case brought suit to recover the installment due after the fire.

Point Involved: Whether by the contract in question, title had been passed, and as a consequence whether the loss was upon the buyer.

COLLINS, J., delivered the opinion of the Court: “The single question here presented is whether the contract entered into between these parties was an executed one, or simply executory. If the former, the title to the logs * * * vested in the vendee corporation; the risk attendant upon the title and the subsequent loss * * * must be borne by it, unaffected by the fact that the vendor was to make delivery in the Mississippi River.

“There is a seeming confusion in the decisions as to

when the title to personal property does pass on sale, but it has arisen out of a failure clearly to distinguish between general contracts for the sale of chattels of a certain kind and contracts for the sale of chattels, specifically ascertained and identified.

“* * * In the case at bar there should be no doubt upon the undisputed facts, that the title vested in the vendee at the date of the agreement. All the vendor's logs lying at a certain point * * * the same being duly marked and sealed were included in the writing * * * (all the items) were stated with particularity. * * * In every respect it was a completed contract and the assent of both parties that the title should pass was obvious. * * *”

(The Court holds that as title had passed, the loss was upon the purchasers and the deferred installments must be paid.)

Question 287: (1.) State the facts, the question presented and Court's decision in the above case.

(2.) At 9 o'clock on Sept. 5, A sold a carriage to B, giving B an order on the liveryman in whose possession it was. At 12 o'clock an execution issued against the goods of A, and by general law became a lien thereon. At 5 o'clock on the same day B came and took the carriage away. The constable now takes the buggy under the execution. B brings replevin against the constable. Can he recover? (*Peterson v. Bostrom*, 99 Ill. Ap. 210.)

Sec. 229. Rules Determining Intention: Seller to Put Goods in Deliverable State.

Case No. 288. Uniform Sales Act, Sec. 19, Rule 2.

“[Unless a different intention appears.] Where there is a contract to sell specific goods and the seller is bound to do something to the goods for the purpose of putting them into a deliverable state, the property does not pass until such thing be done.”

Question 288: State the above rule.

Case No. 289. Hamilton v. Gordon, 22 Ore. 557.

Facts: Suit to recover certain wheat as the property of the plaintiffs. Gordon, the defendant, made a contract with Hamilton & Rourke, the plaintiffs, reading that Gordon "hereby sells and agrees to deliver to Hamilton & Rourke, in their warehouses or platform at Vansycle, Oregon, on or before October 1, 1891, all the grain harvested by me on land described below; wheat sacked in good merchantable sacks, the same being that certain crop now harvested or to be harvested, etc."

Point Involved: Whether under the agreement by which the seller was to harvest and sack grain, before delivery to the buyer, title passed before such harvesting and sacking was done.

BEAN, J., delivered the opinion of the Court:
 " * * * Whether an agreement concerning the sale and delivery of goods * * * is to be treated as an executed or an executory contract, and whether the thing which is the subject of the contract becomes the property of the buyer the moment the contract is concluded, or remains the property of the vendor until the contract is fully executed, is often a difficult and embarrassing question. * * * As between the parties it is generally considered a question of intention. * * * As a general rule where by the agreement the vendor is to do anything with the property for the purpose of putting it into deliverable condition or into that state in which the purchaser is bound to accept it, the performance of these things in the absence of circumstances showing a contrary intention is taken to be a condition precedent to the vesting of the property in the buyer. * * *

" * * * in this case the grain was to be harvested and sacked 'in good merchantable sacks' by the vendor in order to put it in deliverable condition and by him conveyed to the warehouse or platform * * * at Vansycle before plaintiffs were bound to accept or receive it or pay for the same. * * *

"The contract is only a contract for the sale of a cer-

tain crop of grain; and if defendant has violated his agreement by delivering only a part of the grain and refusing to deliver the remainder, plaintiffs, if damaged, have their remedy, but not by an action to recover possession of the property. * * *

Question 289: (1.) State the facts, the question presented and the Court's decision in the above case.

(2.) A had a quantity of wood which B agreed to purchase, A to chop the same into four-foot lengths. Before the wood was chopped, A's creditors seized it under a writ of execution. B claims the wood. Should he prevail? (*Frost v. Woodruff*, 54 Ill. 155.)

(Note: If the goods are specified, but *weighing or measuring* is to be done by the seller to *ascertain the price*, the goods being otherwise in a deliverable state, it is the rule in most states that title does not pass until such weighing or measuring be done. It is shown by Williston (*Sales*, Sections 267, 268, 269) that this "rule was originally founded on a mistake, has no principle behind it, and has already been abolished in some states in this country without the aid of legislation.")

Sec. 230. Rules Governing the Intention of the Parties: Where Goods Delivered on Sale or Return or on Approval.

Case No. 290. Uniform Sales Act, Sec. 19, Rule 3.

"[Unless a different intention appears.]

"(1) When goods are delivered to the buyer 'on sale or return' or on other terms that have indicated an intention to make a present sale, but to give the buyer an option to return the goods instead of paying the price, the property passes to the buyer on delivery, but he may revest the property in the seller by returning or tendering the goods within the time fixed in the contract, or, if no time has been fixed, within a reasonable time.

"When goods are delivered to the buyer on approval or on trial or satisfaction, or other similar terms, the property therein passes to the buyer—

“(a) When he signifies his approval or acceptance to the seller or does any other act adopting the transaction;

“(b) If he does not signify his approval or acceptance to the seller, but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has been fixed on the expiration of a reasonable time. What is a reasonable time is a question of fact.”

Question 290: State when title passes, if at all, under paragraph 1 above; under paragraph 2.

Case No. 291. *Foley v. Felrath*, 98 Ala. 176.

Facts: Foley sued Felrath for \$502.56 for goods sold. Foley was a manufacturer of gold pens in New York City. Being in Mobile, Alabama, he called on defendant and sold a bill of goods, with right in defendant to return some of the goods which he would select and return in exchange for others. The goods were lost in transit to Alabama by the Express Company. Plaintiff sues for the purchase price.

Point Involved: Whether the sale was on approval or sale and return, and accordingly on whom the loss was pursuant to return.

HARALSON, J.: “* * * In *Allen, Bethune & Co. v. Maury & Co.*, *supra* [66 Ala. 17], we said: ‘Where, however, goods are sold and delivered, the terms of sale being specified, and the vendee reserves the right to reject or return, the title passes, liable to be divested by the exercise of this option to rescind expressed within a reasonable time.’ * * * An option to purchase if the party to whom the goods are transferred should like is very different from an option to return the goods if he should not like them. * * *” (Held that risk of loss was on purchaser.)

Question 291: (1.) In the above case was title in the seller or purchaser at the time of the loss?

(2.) What is the difference between a "sale on approval" and a "sale and return"? What important consequence follows upon the distinction?

Case No. 292. Pence v. Carney, 78 Ark. 123.

A, a jeweler, of Hot Springs, sent two diamond rings to B "with the agreement and understanding that if she was pleased with same she should keep them and account to the plaintiff at the above value, and if not pleased would, within a reasonable time return them to" A at Hot Springs. These rings being lost before returned to A, without fault of B, the question was upon whom, as owner, the loss must fall.

Point Involved: The distinction between a shipment on trial or satisfaction or approval and a sale and return.

McCULLOCH, J., delivered the opinion of the Court:
" * * * Under the contract stated the title remained in the seller and any loss or damage sustained from any cause except negligence of the purchaser fell upon the seller. * * * The distinction between the two classes of contracts is concisely stated by the Supreme Court of Massachusetts in Hunt v. Wyman (100 Mass. 198), as follows: 'An option to purchase if he liked is essentially different from an option to return if he should not like. In one case the title will not pass until the option is determined; in the other, the property passes at once, subject to the right to rescind and return' * * *"

Question 292: (1.) Was the title in the seller or purchaser when the loss occurred?

(2.) On whom was the loss? Why?

Case No. 293. Springfield Engine Stop Co. v. Sharp, 184 Mass. 266.

Facts: Suit for \$200 for the price of an engine stop installed in Sharp's factory. The stop was put in for a 30 days' trial and was to be taken away if defendant did not like the stop. This 30 days was afterwards extended to another 30 days. The 60 days expired on June 30 or

July 1. On Monday, July 3rd, defendants wrote plaintiff that they had decided not to take the stop and it could be taken out at plaintiff's convenience. The stop was used on Saturday, July 1st and Monday, July 3rd, and plaintiff contends that this failure to give notice until the 3rd and the use of the stop on the 1st and 3rd made defendants liable. Defendants had judgment below and plaintiff appeals.

Point Involved: Whether when goods are sent on trial for a certain period of time, the expiration of that time *ipso facto* vests title in the buyer (there being no express stipulation) unless he returns the goods or gives notice of the rejection within the time stated; and whether the use of the goods after the period is conclusive evidence of an election to keep them.

LORING, J.: "The true rule is laid down in the other cases cited by the plaintiff, and it is this: The party to the contract who is to make the trial has the full period agreed upon for the trial, and in the absence of any stipulation on the point he has a reasonable time after the expiration of it to signify his election. See *Elphick v. Barnes*, 5 C. P. D. 321; *Spickler v. Marsh*, 36 Md. 222; *Kahn v. Klabunde*, 50 Wis. 235; *Waters Heater Co. v. Mansfield*, 48 Vt. 378.

"The plaintiff's next contention is that it had a right to go to the jury on the use made on Saturday and on Monday as evidence of the defendants' election to take the stop. The retention of the stop after Friday, June 30, apart from the use of it, had no significance. This was not the case of a sale or return; by the terms of the agreement which the plaintiff was to disconnect the stop from the engine and take it away if the defendants were not satisfied with it. But the use of the stop after the expiration of the period of trial agreed upon, unexplained, would be evidence of an election, as is the failure to return a machine taken under a sale or return agreement. See *Kahn v. Klabunde*, 50 Wis. 235; *Spickler v. Marsh*, 36 Md. 222; *Waters Heater Co. v. Mansfield*, 48 Vt. 378. The

English cases are collected in Benjamin, Sales, 593 *et seq.* In the case at bar the use of the stop on Monday could not be taken to be evidence of an election, for on Monday morning the defendants wrote to the plaintiff that they elected to take the other stop, and the letter was posted between two and three o'clock on that day. This letter deprives the use made of the machine on Monday of all force as evidence of an election, as was said in *Hunt v. Wyman*, 100 Mass. 198, 200, in a similar case. See also *Elphick v. Barnes*, 5 C. P. D. 321.

"There is nothing on the record showing why the defendant used the stop on Saturday. If, for example, the use on Saturday came from inadvertence or because the defendants thought that the extension did not expire until the end of that day, the use on that day would be deprived of all force as evidence of an election, as we have held to be the case of the use on Monday. And there may have been other explanations of that use which would result in the same conclusion.

"But no explanation was given at the trial as to the use made of the machine on Saturday, and on this state of the evidence the plaintiff had a right to go to the jury on the question whether the use of the stop on Saturday showed an election to take the stop and that the defendants afterward changed their minds and wrote the letter declining it on Monday.

"Exceptions sustained."

Question 293: (1.) In the above case, did title vest on receipt of the stop, subject to defeasance, or was it to vest at the end of the period?

(2.) Did the defendant have any time after the expiration of the period?

(3.) In the language of Sec. 19, Rule 3, of the Sales Act, what sort of a sale was this?

(Note: That by the language of the Sales Act, there is *no* time given after the period if that Act is to be literally followed.)

Case No. 294. *House v. Beak*, 141 Ill. 290.

Facts: Goods were sent to defendants at certain prices, to be paid for as sold, all unsold goods to be re-

turned. The transaction was not a consignment but a sale with right to return. The goods were kept for about three years without being returned.

Point Involved: What constitutes a reasonable time in which they must be returned (there being no time stated); and the effect of a failure to return them within that time.

MR. CHIEF JUSTICE MAGRUDER: “* * *

“‘A contract “on sale and return” is an agreement, by which goods are delivered by a wholesale dealer to a retail dealer to be paid for at a certain rate, if sold again by the latter; and if not sold to be returned.’ (Story on the Law of Sales, sec. 249.) If the vendee returns the goods, the contract of sale is at an end; if he does not, the sale becomes absolute, and the price of the goods may be recovered in an action for goods sold and delivered. If no time is specified within which the return is to be made, the law implies that they are to be returned within a reasonable time. What is a reasonable time will depend upon the circumstances of each case. (Idem.) In such cases, the property in the goods passes to the purchaser subject to an option in him to return them within a fixed or reasonable time; the price is fixed at the time of the sale and delivery of the goods; the purchaser deals with the goods as his own, disposes of them as he pleases for cash or on credit, is under no obligation to give any account of his disposition of them, and is only liable to pay for them at a price fixed beforehand, without any reference to the price at which he sells them. (Jameson v. Gregory, 4 Metc. (Ky.) 363; In re Linforth, 4 Sawyer (U. S. C. C. Rep.) 370; Ex parte White in re Neville, Law Rep. 6 Chanc. App. 397.) * * *

“Such sales may be regarded as subject to a condition subsequent, that is, upon condition that, if the goods are not sold, they are to be returned. Therefore, the property vests presently in the vendee, defeasible on the performance of the condition. If the defendant disables himself from performing the condition, or fails to perform it within a reasonable time, his liability to pay the price

fixed becomes unconditional, and the plaintiff may declare as upon an *indebitatus assumpsit*. (Ray v. Thompson, 12 Cush. 281.)”

Question 294: (1.) When the defendants received the goods, in whom was title?

(2.) What is the effect of a failure to return within the time given?

Sec. 231. Rules Determining Intention: Upon Appropriation of Goods Unascertained at Time of Sale.

Case No. 295. Uniform Sales Act, Sec. 19, Rule 4.

“Rule 4. (1) Where there is a contract to sell unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be expressed or implied, and may be given either before or after the appropriation is made.

“(2) Where, in pursuance of a contract to sell, the seller delivers the goods to the buyer, or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to or holding for the buyer, he is presumed to have unconditionally appropriated the goods to the contract, except in cases provided for in the next rule and in section 20. This presumption is applicable, although by the terms of the contract, the buyer is to pay the price before receiving delivery of the goods, and the goods are marked with the words ‘collect on delivery’ or their equivalents.”

Question 295: State Rule 4 (1) and Rule 4 (2).

Case No. 296. Mucklow, Assignee, v. Mangles, 1 Taunt. 318.

Facts: Royland, who was a barge builder, undertook to build a barge for Pocock out of materials furnished by

Royland. Pocock advanced some money on the barge before it was begun and as the work proceeded he paid him more. When the work was nearly finished Pocock's name was printed on the stern. Two days after the completion of the work, and before the barge was delivered to Pocock, Mangles, the defendant, as sheriff took the property as the property of Royland but delivered it to Pocock under an indemnity. Afterwards a commission in bankruptcy issued against Royland upon an act of bankruptcy committed before the completion of the vessel and Mucklow as his assignee in bankruptcy brings suit against Mangles for interference with the property alleged to belong to the bankrupt.

Point Involved: At what point title passes under a contract by the seller to manufacture an article out of property furnished by the seller, where the work progresses on the article and it is seen and approved by the purchaser during its progress, and payments are made on the contract.

MANSFIELD, C. J.: "The only effect of the payment is that the bankrupt was under a contract to finish the barge; that is quite a different thing from a contract of sale, and until the barge was finished we cannot say that it was so far Pocock's property that he could have taken it away. It was not finished at the time when Royland committed the act of bankruptcy; it was finished only two days before the execution. * * *"

HEATH, J.: "This is a species of contract which in the civil law is described by the term *Do ut facias*. It comes within the cases that have been held to be executory contracts, and, as such, not within the Statute of Frauds, as contracts for the sale of goods. A tradesman often finishes goods which he is making in pursuance of an order given by one person and sells them to another. If the customer has other goods made for him within the stipulated time he has no right to complain; he could not bring trover against the purchaser for the goods so sold. The

painting of the name on the stern in this case makes no difference. If the thing be in existence at the time of the order, the property of it passes by the contract but not so where the subject is to be made."

Question 296: (1.) State the facts in the above case, the question presented and the Court's decision.

(2.) A orders a wagon to be made by B out of materials furnished by B. B proceeds to build a wagon, which A from time to time sees and with which he expresses his approval. After it is finished, except the painting, the wagon burns, and B is unable to deliver the wagon by the time agreed on. A sues B. Has B any defense?

Case No. 297. Rohde and Others v. Thwaites, 6 Barnewall & Cresswell's Rep. 388.

Facts: Suit for the price of 20 hogsheads of sugar, alleged to have been sold by Rohde to Thwaites. On Dec. 3, 1825, Rohde had in his warehouse on the floor in bulk, a much larger quantity of sugar than would be required to fill 20 hogsheads, but no part was in hogsheads. Defendant, Thwaites, saw the sugar in this condition and made the contract in question. Four hogsheads were filled up and delivered to defendant on December 10, and a few days afterwards plaintiff filled up the remaining 16 hogsheads, and gave notice to the purchaser that they were ready and for him to take them away, to which reply was made that he would take them away as soon as he could. The point whether title had passed, or it was a mere executory contract to sell, arises on a technical question of pleading.

Point Involved: Whether as to the 16 hogsheads there was a sufficient appropriation by the seller with the consent of the buyer to pass the title to the defendant.

BAYLEY, J.: "Where a man sells part of a large parcel of goods, and it is at his option to select part for the vendee, he cannot maintain any action for goods bargained and sold, until he has made that selection; but as

soon as he appropriates part for the benefit of the vendee, the property in the article sold passes to the vendee, although the vendor is not bound to part with the possession until he is paid the price. Here there was a bargain, by which the defendant undertook to take twenty hogsheads of sugar, to be prepared or filled up by the plaintiffs. Four were delivered; as to them there is no question, but as to the sixteen it is said, that as there was no note or memorandum of a contract in writing sufficient to satisfy the statute of frauds, there was no valid sale of them; and that the plaintiffs in their declaration having stated their claim to arise by virtue of a bargain and sale, cannot recover for more than the four hogsheads which were actually delivered to and accepted by the defendant; that in order to recover for the others they ought to have declared specially, that, in consideration that the plaintiffs would sell, the defendants promised to accept them. In answer to this, it is said that there was an entire contract for twenty hogsheads, and that the defendant, by receiving four, had accepted part of the goods sold within the meaning of the seventeenth section of the statute of frauds. In fact, the plaintiffs did appropriate, for the benefit of the defendant, sixteen hogsheads of sugar, and they communicated to the defendant that they had so appropriated them, and desired him to take them away; and the latter adopted that act of the plaintiffs, and said he would send for them as soon as he could. I am of opinion, that by reason of that appropriation made by the plaintiffs, and assented to by the defendant, the property in the sixteen hogsheads of sugar passed to the vendee. That being so, the plaintiffs are entitled to recover the full value of the twenty hogsheads of sugar, under the count for goods bargained and sold. The rule for setting aside this writ of inquiry must therefore be discharged."

Question 297: State the facts, the question presented and the Court's decision in the above case.

Case No. 298. Bryans v. Nix, 4 M. & W. 775.

Facts: Plaintiffs sue defendants for conversion of oats alleged to belong to plaintiffs and claimed by defendants. The controversy arose as follows: One Tempany was a shipper and exporter of grain at Longford, Ireland. He shipped a cargo of oats on board boat No. 604, and sent the bill of lading to plaintiffs, together with another bill for oats on boat 54, but there were at that time no oats on boat 54. This took place February 2. The boat was partially loaded afterward for delivery to plaintiffs, but Tempany changed his mind and sold the oats on boat 54 to defendants who got possession, and they are now sued by plaintiffs who claim the oats as their own.

Point Involved: Whether partial appropriation of the goods in receptacles furnished by the seller passes the title to the goods so partially appropriated.

PARKE, B.: “* * *

“In our opinion, therefore, the plaintiffs had a complete title to the cargo of the boat 604, at least on the 7th of February, when they complied with the condition by accepting the bill; and before the 7th, no other title as to the oats intervened; for the order to deliver them to Walker, given on the 6th, was clearly executory only. But the claim of the plaintiffs to the cargo of boat 54 stands on a very different footing.

“At the time of the agreement, proved by the bill of lading or boat-receipt of the 31st January, to hold the 530 barrels therein mentioned for the plaintiffs, there were no such oats on board; and consequently no *specific chattels* which were held for them. The undertaking of the boat-master had nothing to operate upon, and though Miles Tempany had prepared a quantity of oats to put on board, those oats still remained his property; he might have altered their destination, and sold them to any one else; the master’s receipt no more attached to them, than to any other quantity of oats belonging to Tempany. If, indeed, after the 31st of January, these oats so prepared, or any other like quantity, had been put on board to the

amount of 530 barrels, or less, for the purpose of fulfilling the contract, and received by the master as such, before any new title to these oats had been acquired by a third person, we should have probably held, that the property in these oats passed to the plaintiffs, and that the letter and receipt, though it did not operate, as it purported to do, as an appropriation of any existing specific chattels, at least operated as an executory agreement by Tempany and the master and the plaintiffs, and that when so put, the master should hold them on their account; and when that agreement was fulfilled, then, but not otherwise, they would become their property. But before the complete quantity of 530 barrels was shipped, and when a small quantity of oats only were loaded, and before any appropriation of oats to the plaintiffs had taken place, Tempany was induced to enter into a fresh engagement with the defendant, to put on board for him a full cargo for No. 54, by way of satisfaction for the debt due to him; for such is the effect of the delivery order of the 6th, and the agreement with Walker, of the same date, to send the boat-receipt for the cargo of that vessel. Until the oats were appropriated by some new act, both contracts were executory. On the 9th this appropriation took place, by the boat-receipt for the 550 barrels then on board, which was signed by the master, at the request of Tempany; whereby the master was constituted the agent of the defendant to hold those goods; and this was the first act by which these oats were specifically appropriated to any one. The master might have insisted on Tempany's putting on board oats to the amount of the first bill of lading, on account of the plaintiffs, but he did not do so."

Question 298: State the facts and the holding in the above case.

Case No. 299. Belz & Co. v. McMorrow, 173 Mass. 8.

Facts: Suit by Belz & Co. for the price of 10 hogsheads and 2 barrels of ale sold to McMorrow. Defense that the ale was sold at Boston without the license required by law. Belz & Co. was a Philadelphia corporation and the goods

were ordered through an importing broker located at Boston, who was directed to have the goods delivered at Boston. Belz & Co. accepted the order and shipped the goods by the Phila. S. S. Co., taking bills of lading making them deliverable to McMorrow. One of the bills of lading was sent to McMorrow and the other to a forwarder for the S. S. Co., who took the goods to McMorrow, who paid the freight. The Court found for the plaintiff. Defendant appeals.

Point Involved: Whether the goods shipped by a carrier from the seller to the purchaser who paid the freight, became the property of the consignee at point of shipment or point of destination.

HOLMES, J.: “* * * On this state of facts, we cannot say that the finding of the Court was unwarranted; for in view of the defendant’s paying the freight, it was entirely reasonable for the Court to find that the defendant’s direction to Hayes [the broker] to deliver the ale at his place of business (assuming the Court to have believed that it was given) was meant only to give the address of destination, and neither had nor was intended to have any effect on the question when title passed. If this view be taken, then the case is governed by the general rule that a shipment by a seller with an independent common carrier, to the order of the buyer, passes the title as soon as the carrier receives the goods. * * *”

Question 299: A, of New York, writes to a Chicago typewriter maker, ordering a machine. The addressee selects a machine from its stock and hangs out a sign notifying the Adams Express Co. to call. A driver stops and picks up the machine. While in the wagon the machine is struck by lightning and destroyed. A is sued for the price of the typewriter. Has he any defense?

(Note: This rule that title passes on delivery to the carrier is subject to the further rule that the goods shipped must fulfill the contract. If the goods are defective, or do not correspond to description, or are insufficient in quantity, the buyer may reject them.)

Case No. 300. Carthage v. Duvall, 202 Ill. 234.

Facts: The City of Carthage by ordinance made illegal a sale of liquor in less quantities than five gallons, and subjected the offender to a penalty. One Skidmore, a resident of Carthage, ordered a gallon of whiskey from the Dallas Transportation Co., dealing in liquor at Burlington, Iowa. The company sent it by express, Collect on Delivery, and Duvall, the agent of the express company, delivered it in Carthage to Duvall. The city prosecutes Duvall under the ordinance mentioned.

Point Involved: At what point title passes where unascertained goods are purchased to be put on board cars by the seller for delivery to the purchaser. Whether the fact that the shipment is "C. O. D." changes the rule.

MR. JUSTICE HAND delivered the opinion of the Court:
 " * * * The general rule frequently announced by this Court is, that the delivery of personal property by the seller to a common carrier to be conveyed to the purchaser is a delivery to the purchaser, and that the title to the property vests in the purchaser immediately upon its delivery to the carrier. (Pike v. Baker, 53 Ill. 163; Ward v. Taylor, 56 id. 494; Ellis v. Roche, 73 id. 280.) Whether such rule applies where the property is consigned C. O. D. is an open question in this court, but upon principle and authority, where, as here, everything which the seller has to do with the property has been done at the time it is delivered to the carrier, we see no reason why the title does not vest in the purchaser immediately upon its delivery, although it is consigned C. O. D., or why the same rule should not be applied to intoxicating liquor that is applied to other classes of personal property. In several states (State v. O'Neil, 58 Vt. 140; State v. United States Express Co., 70 Iowa, 271; State v. Wingfield, 115 Mo. 428) the courts hold that the title to intoxicating liquor when it is consigned C. O. D. does not vest in the purchaser until it is received, accepted and paid for. The great weight of authority, however, is the other way. * * * From an

examination of the authorities cited in the briefs, and such other authorities as we have been able to find bearing upon the subject, we have reached the conclusion that the sale to Skidmore was completed when the liquor was delivered to the express company in Burlington, and that no sale of liquor was made by the defendant to Skidmore in the City of Carthage."

Question 300: (1.) When goods are sent by a carrier C. O. D., does title pass on delivery to the carrier, provided it would have passed had the goods not been sent C. O. D.?

(2.) Does the fact that the goods shipped are intoxicating liquors change the rule?

Sec. 232. Rules Determining Intention—Where Seller Is to Deliver at Particular Place.

Case No. 301. Uniform Sales Act, Sec. 19, Rule 5.

"[Unless a different intention appears.] If a contract to sell requires the seller to deliver the goods to the buyer or at a particular place, or to pay the freight or cost of transportation to the buyer, or to a particular place, the property does not pass until the goods have been delivered to the buyer or reached the place agreed upon."

Case No. 302. Dentzel, Adm'r, of G. A. Dentzel, Deceased, v. Island Park Asso. and others, 229 Pa. 403, 33 L. R. A. N. S. 54.

Facts: Replevin by the seller of a carrousel to recover it back from the buyer on the theory that title has not yet passed to the buyer. The carrousel was shipped "f. o. b. cars, Philadelphia" (the point of shipment), the buyer agreeing to pay freight charges. The contract was that the buyer should pay \$5,000, as follows: \$250 on signing the agreement, \$2,500 on the erection of the machine in the park, \$900 in 60 days thereafter, and \$950 in 90 days thereafter, notes to be given for the last three payments. The seller agreed to furnish a man to erect and place the car-

rousel in order. The seller asserted dominion over the property after it reached its destination, and seeks to recover it back in this suit, claiming that title has not yet passed.

Point Involved: When title passes where goods are shipped f. o. b. point of shipment to the buyer. Whether the fact that the goods are not yet paid for affects the rule.

STEWART, J.: "It is a general rule, not to be questioned, that when the contract in a sale of personal property calls for delivery f. o. b. at some particular place, and the seller there delivers the article in accordance with the stipulations, the title to the property at once passes to the buyer, unless otherwise provided. *Schmertz v. Dwyer*, 53 Pa. 335; *Bacharach v. Chester Freight Line*, 133 Pa. 414, 19 Atl. 409; *Dannemiller v. Kirkpatrick*, 201 Pa. 218, 50 Atl. 928. The rule yields where the contract reserves to the seller the right of property, notwithstanding the delivery to the carrier. Since delivery is after all a matter of intention on the part of the seller, even though the contract calls for delivery f. o. b. cars at a designated place of shipment, the seller may, before the delivery on board the cars, stipulate with the carrier that the latter is to carry it for him, thereby making the carrier the seller's agent in receiving the property. This follows when the seller takes from the carrier a bill of lading which secures the shipper against delivery, at the point of destination, to anyone except upon his order. When the contract, however, as here, shows an agreement to deliver f. o. b., with nothing to qualify it, the law will presume a delivery to have been in accordance with the stipulations, and cast the burden on the seller if he assert the contrary. There is not a particle of evidence in the case that this burden was discharged. * * * [The Court ordered judgment entered for the defendant.]

Question 302: (1.) What bearing do the words "free on board" have on the determination of the question?

(2.) Do such (or similar) words, as a matter of law, cause title to vest at a certain point?

(3.) How may the seller expressly prevent the buyer from obtaining title at the place at which the goods are f. o. b., notwithstanding the rule stated? (See next case.)

(4.) A and B make an agreement whereby A sells to B a certain quantity of rye, f. o. b. cars at Bronson Station. The rye deteriorates while in transit to the station, without fault of the seller. B sues A for breach of warranty. Who will win? (Drews et al. v. Ann River Logging Co., 53 Minn. 199.)

(5.) A sold B goods f. o. b. point of destination. The goods are lost during transit. As between seller and buyer, on whom will loss fall? (Hunter Bros. Mill Co. v. Kramer, 71 Kan. 468.)

B. Reservation of Title by Means of Documents of Title.

Sec. 233. Title Reserved in Bill of Lading.

Case No. 303. Uniform Sales Act, Sec. 20.

(See page 590, *post.*)

Question 303: Enumerate the various ways by which a seller may retain title in himself by the form or disposition of the bill of lading.

Case No. 304. Greenwood Groc. Co. v. Canadian County Mill Co., 76 S. C. 450.

Facts: The defendant, Canadian County Mill & Elevator Company, incorporated under the laws of Oklahoma, contracted to sell and deliver to plaintiff, Greenwood Grocery Company, at Greenwood, South Carolina, 250 barrels of flour at \$4.50 per barrel. The defendant consigned to the plaintiff the flour, and sent draft on plaintiff, with bill of lading attached, to Bank of Greenwood, but the draft required payment of \$5.50 per barrel instead of \$4.50. Plaintiffs tendered the price of \$4.50 which the bank refused to accept. Plaintiff thereupon brought an action against the defendant for damages for breach of contract. In order to secure service of process upon defendant in South Carolina to give the South Caro-

lina courts jurisdiction, rather than to go to Oklahoma to begin suit, the plaintiff attached the flour on the ground that it was the property of the defendant and therefore, because defendant had property in South Carolina, suit might be brought against it there. Defendant contended that it had no property in South Carolina and no service could in that way be secured upon it in South Carolina, but that the proceedings were void and should be dismissed.

Point Involved: Generally how title may be retained by the seller by the form or disposition the bill of lading, notwithstanding delivery of the goods to carrier for shipment to buyer.

Woods, J., delivered the opinion of the Court:

“The sole question, therefore, is whether by drawing on the plaintiff with the bill of lading attached to the draft and refusing to deliver the bill of lading without payment of the draft, the defendant retained title and right of possession of the property. The effect of a bill of lading issued by the carrier, who is a third party, on the title to the property as between the consignor and consignee is a question of fact depending not only on the terms of the paper itself, but on the intention of the parties as expressed by their dealings with each other.

* * * The fact that the bill of lading is taken, making the goods deliverable to the order of the vendor, who is himself the consignor, is very strong *prima facie* evidence that the vendor in delivering the goods to the carrier intended to reserve the title until payment of the purchase money; and when a draft for the price is drawn on the purchaser with such bill of lading attached, the title does not ordinarily pass to him until the draft is paid. * * * But this presumption may be rebutted by other circumstances and previous dealing of the parties evidencing a different intention. * * *

“In this case, however, it seems by the terms of the bill of lading the goods were deliverable to the consignee.

The presumption, therefore, was that the consignor intended the title to pass. * * * If, therefore, the railroad company had delivered the goods to the consignee without the surrender of the bill of lading and without notice of any reservation of title and possession, it would not be liable to the consignor, though he actually intended to reserve the title and possession until payment of his draft for the price. * * * As between the vendor and purchaser, the authorities leave no room to doubt, however, that, even if the bill of lading provides for delivery to the consignee, yet, if the consignor draws for the price, attaching the bill of lading to the draft, this is sufficient evidence of his intention to reserve the title and right of possession until the draft is paid, and the consignee is not entitled to the goods until payment.

* * * Here * * * not only did the defendant, the consignor, express its intention to reserve the *jus disponendi* by presenting through a bank the draft with the bill of lading attached, the plaintiff expressed this to be also its understanding of the contract by offering to pay the price, as it claimed it to be, as a condition precedent to acquiring possession of the bill of lading, and through it of the flour.

“It is argued, however, that, according to the complaint, which must be taken as true, the plaintiff tendered the real price agreed upon, and that by such tender he became entitled to the flour without respect to the amount of the draft. This argument is not without force, but it is not convincing, nor is it sustained by authority.”

Question 304: (1.) In what ways may the seller reserve his title so that it will not pass on delivery to the carrier? How was it done in this case?

(2.) If the carrier had had no notice of the reservation of title in this case and had delivered the goods to the consignee, would it have been liable? Suppose the sender had used an “order” bill of lading, would your answer be the same?

C. Transfer of Title in Auction Sales.

- | | |
|---|-------------------------------|
| § 234. General rules governing sales
by auction. | § 236. Sales without reserve. |
| § 235. General rule when title
passes. | § 237. Fraudulent bids. |

Sec. 234. General Rules Governing Sales by Auction.

Case No. 305. Uniform Sales Act, Sec. 21.

(See page 591, *post.*)

Sec. 235. General Rule When Title Passes in Auction Sales.

Case No. 306. *Anderson v. Wisconsin Ry. Co.*, 107 Minn. 296.

Facts: The Wisconsin Central R. R. Co. advertised certain buildings for sale to be removed from certain lands taken under condemnation proceedings. One Anderson attended the sale, making certain bids and he was outbid by a person who offered \$675.00. Anderson then bid \$680.00, but the auctioneer refused to accept it on the ground that the raise was too small, and proceeded to sell the property to the last bidder at \$675.00. Anderson sues the R. R. Co. claiming damages, contending that the advertisements of the sale constituted an offer which was accepted by the highest bidder at the sale and, therefore, that a contract between the parties became complete when Anderson bid \$680.00.

Point Involved: When and how is a contract of sale made where goods are sold at auction? Is the bid an offer or an acceptance?

ELLIOTT, J.: "The custom of selling goods at auction is as old as the law of sale. In Rome military spoils were disposed of at the foot of the spear—*sub hastio*—by auction, or increase. In later times we find a mode of auction called a 'sale by the candle,' or by the 'inch of candle,' which consisted of offering the prop-

erty for sale for such a length of time as would suffice for the burning of an inch of candle. * * *

“In view of the general prevalence of the custom of selling by auction, it is remarkable that no very early cases are found in the English reports. The parent case of *Payne v. Cave*, 3 T. R. 148, was decided by Lord Kenyon, Ch. J., sitting at Guildhall in 1788. The plaintiff offered a distilling apparatus for sale, including a pewter worm, at public auction, on the usual conditions that the highest bidder should be the purchaser. There were several bidders for the worm, of whom Cave, who bid £40, was the last. The auctioneer dwelt on this bid for some time, until Cave said: ‘Why do you dwell? You will not get more.’ The auctioneer stated that he was informed that the worm weighed at least 1,300 hundred-weight, and was worth more than £40. The bidder then asked him if he would warrant it to weigh so much, and receiving an answer in the negative, he declared that he would not take it. The worm was then resold on a subsequent day for £30, and an action was brought against Cave for the difference. Lord Kenyon ruled that the bidder was at liberty to withdraw his bid at any time before the hammer fell, and non-suited the plaintiff. On motion to set aside the non-suit, it was contended that a bidder is bound by the conditions of the sale to abide by his bid, and could not retract; that the hammer is suspended, not for the benefit of the bidder, or to give him an opportunity for repenting, but for the benefit of the seller; and that in the meantime the person who bid last is a purchaser, conditional upon no one bidding higher. But the Court thought otherwise, and held that the auctioneer was the agent of the vendor, and that the assent of both parties was necessary to make the contract binding, and ‘that is signified on the part of the seller by knocking down the hammer, which was not done here until the plaintiff had retracted.’ ‘An auction,’ said the Court, ‘is not inaptly called a *locus poenitentiae*. Every bidding is nothing more than an offer on one side, which is not binding on either side until

assented to.' (Here the Court reviews numerous authorities.) * * * On principle and authority the correct rule is, that an announcement that a person will sell his property at public auction to the highest bidder is a mere declaration of intention to hold an auction at which bids will be received; that a bid is an offer which is accepted when the hammer falls; and until the acceptance of the bid is signified in some manner neither party assumes any legal obligation to the other. At any time before the highest bid is accepted, the bidder may withdraw his offer to purchase, or the auctioneer his offer to sell. The owner's offer to sell is made at the time through the auctioneer, and not when he advertises the auction sale. A merchant advertises that on a certain day he will sell his goods at bargain prices; but no one imagines that the prospective purchaser, who visits the store and is denied the right to purchase, has an action for damages against the merchant. He merely offers to purchase, and if his offer is refused, he has no remedy although he may have lost a bargain, and have incurred expense and lost time in visiting the store. The analogy between such a transaction and an auction is at least close. As the advertisement in this case was a mere statement of intention to offer the property for sale at public auction to the highest bidder, the respondent's bid did not complete either a contract of sale or a contract to make a sale."

See p 33

Question 306: (1.) State the facts, the question presented and the Court's decision in this case.

(2.) What were the facts and the Court's decision in *Payne v. Cave*?

Sec. 236. Sales Advertised to Be Without Reserve.

(Note: This provision of the Uniform Sales Act follows the statutes already in force in a few of the states. But such is not the law in most states except as they adopt the Uniform Sales Act, with this provision.)

Sec. 237. Fraudulent Bids in Auction Sales.

Case No. 307. Pennock's Appeal, 14 Pa. St. 446.

Facts: Sale of land by an administrator at public auction under order of court. Bid in and sold to Abraham Pennoch and Jas. Sellers, Jr., who now file exceptions to the report of the administrator alleging that they bid the sums reported by him by reason of the puffing and false bids of other persons, in connivance with the administrator.

Point Involved: Whether secret bidding by the owner or his agent, is fraudulent.

GIBSON, C. J.: "It is impossible to doubt the principle of the civil law adopted by Lord Mansfield, in *Bexwell v. Christie*. Good faith is an indispensable ingredient of fair dealing; and it is impossible to imagine a purpose, consistent with it, for which sham bidding is necessarily employed. The vendor may prescribe conditions of sale which will enable him to retain the property should it not come up to his price; and if he do not produce the effect openly, why should he do it covertly? Common honesty requires that all should be fair and above-board. To screw up the price, as it has been aptly termed, by secret machinery, can be no less than a fraud; and a sham bidder can be used for no other purpose. The decisions on the subject have fluctuated; but the largest license allowed in any of them has been to employ a single puffer; yet, whether there be one, or whether there be twenty, the mischief is the same, except as to the degree of it. It has been said that the employment of a plurality discloses too clearly to be mistaken, not a design to protect the property from being sacrificed, but to give an artificial impulse to the sale of it. That touches the honesty of the vendors's motive; but what have the bidders to do with it? Should he actually think that not less than twenty could protect it, the sale would still be, according to all the cases, fraudulent and void.

Question 307: What is "by-bidding"? Why is it deemed unlawful?

D. Risk of Loss.

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|---|---|
| § 238. The general rules. Risk attends title. | sion, retains title for purposes of security. |
| § 239. Risk of loss where seller, though delivering posses- | § 240. Risk of loss in sales on approval. |

Sec. 238. The General Rules—Risk Attends Title.

Case No. 308. Uniform Sales Act, Sec. 22.
(See page 591, *post*.)

Question 308: (1.) State generally with whom is the risk of loss.

(2.) When is risk on buyer, notwithstanding title has been retained by seller?

(Note: See cases on transfer of title, *supra*.)

Sec. 239. Risk of Loss Where Seller Though Delivering Possession Retains Title for Purpose of Security.

Case No. 309. *Burley v. Tufts*, 66 Miss. 48.

Facts: Tufts sold Burnley a soda water fountain on installments, title to remain in Tufts until the last installment was paid. Before the last installment became due, the soda water fountain was destroyed by fire without the fault of either. Burnley claimed that he was not liable to Tufts for the last installment, as Tufts still held the legal title, and therefore risk of loss from fire was on him.

Point Involved: Upon whom is the risk of loss in a sale, in which possession is delivered to the purchaser, title being reserved in the seller for purposes of security.

COOPER, J., delivered the opinion of the Court: "Burnley unconditionally and absolutely promised to pay a certain sum for the property, the possession of which he

received from Tufts. The fact * * * (of destruction) does not relieve him of payment of the price agreed upon. * * * The transaction was something more than an executory conditional sale. The seller had done all he was to do except receive the purchase price; the purchaser had received all he was to receive. * * * The contract made * * * imposed upon the buyer an absolute promise to pay."

Question 309: State the facts, the question presented and the Court's decision in this case.

Sec. 240. Risk of Loss in Sales on Approval.

Case No. 310. Foley v. Felrath, 98 Ala. 176.
(Set out as Case No. 291, *supra*.)

Question 310: On whom was risk of loss in this case? Why?

Case No. 311. Pence v. Carney, 78 Ark. 123.
(Set out as Case No. 292, *supra*.)

Question 311: On whom was risk of loss in this case? Why?

CHAPTER FORTY-ONE

TRANSFER OF TITLE AS AFFECTING THIRD PERSONS

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| A. Estoppel of true owner to assert title. | C. Sale by one having voidable title. |
| B. Provisions of recording acts, factors' acts, etc. | D. Retention of possession. |

A. ESTOPPEL OF TRUE OWNER TO ASSERT TITLE.

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| § 241. Only true owner can give title. | § 243. Allowing another to assert ownership as estoppel. |
| § 242. Mere possession given to another no estoppel. | § 244. Clothing another with documentary or record indicia of title as estoppel. |

Sec. 241. Only True Owner Can Give Title.

Case No. 312. Uniform Sales Act, Sec. 23.
(See page 591, *post.*)

Question 312: Generally speaking, can anyone except the owner of goods transfer title thereto (by himself or through agent)?

Sec. 242. Mere Possession Given to Another No Estoppel.

Case No. 313. *Fawcett v. Osborne*, 32 Ill. 411.

Facts: This was a suit at law brought to obtain the value of 2,000 sides of hemlock tanned sole leather. *Fawcett, Isham & Co.*, had made a contract with *W. H. & F.*

Stevens, by which the latter, who operated a tannery, were to tan leather for F. I. & Co. The hides when tanned were to be delivered to F. I. & Co. at New York City. In September, 1856, Fletcher Stevens, of the Stevens firm, shipped secretly, a large quantity of the leather manufactured from the plaintiff's hides to places other than New York City. Two thousand sides of this leather were shipped to Chicago, and there sold by a man who was in connivance with Stevens, to the defendant who made payment therefor. Plaintiffs having traced the leather into the hands of defendants demanded its return, which was refused. The defense made is that the purchase under the circumstances to defendants vested title in them.

Point Involved: Whether the fact that the owner of the goods put the goods in the possession of a bailee to do work thereupon estopped such owner to assert title against an innocent purchaser to whom such bailee in violation of his duty sold the goods.

MR. JUSTICE BREESE delivered the opinion of the Court:
“* * * The defendants contend that they bought the property in good faith, in the regular course of business, paying a full price in open market, and with no knowledge of a want of title in their vendor, in whose possession the property was, when purchased by them. * * * Assuming a name which did not belong to him, and inducing his agent, Stanton, to do the same, the defendants' vendor took this leather to Chicago, and there, unknown to the business men of that city, or to his vendee, the defendant here, with no evidence of title, documentary or mercantile, relying on his bare possession, fraudulently, if not feloniously obtained, the defendants become the purchasers of two thousand hides, of the estimated value of near eight thousand dollars. The ordinary inquiries and caution, usually exhibited in a large sale like this, seem not to have been made or observed in this transaction, and the question is plainly and distinctly raised, ‘Has the real owner lost his title to the

property by the force of the facts proved?' * * * we are satisfied that the plaintiffs had never parted with the property in this leather, or bestowed the possession of it upon anyone, with a view to a sale and disposal of it; nor have they given * * * such evidence of a right to sell it, as according to the custom of trade, and the understanding of community usually accompanies the authority for disposal. The defendant's vendor had but a naked possession. This cannot prevail against the right of the real owner, who is entitled to follow his property, and reclaim it wherever found. The buyer should have 'taken care' that the title was in his vendor, —he having no title, the defendants acquired none.

"The rule we have sanctioned may seem a rigid one, and may involve purchasers in some perils, but it is a safeguard to the protection of the owners' rights in goods and other property necessarily placed under the temporary control of others, and in their legal, though qualified possession."

Question 313: State the facts, the question presented and the Court's decision in this case.

Case No. 314. Charles Moe Co. v. J. H. Logue Co., 108 Ill. Ap. 128.

Facts: The facts appear in the opinion.

MR. PRESIDING JUSTICE BALL delivered the opinion of the Court: " * * * October 18, 1901, Logue, the president of appellee, gave a diamond to one Stein, to show to a prospective customer. It was not given Stein to sell. He was to return it at 2 p. m. of the same day, as another customer had the refusal of it. Instead of carrying out this agreement Stein pawned the stone to appellant for \$100. Logue made demand on appellant for its return. The latter refused to comply unless the sum it had loaned upon the diamond was repaid. Thereupon appellee brought replevin, and recovered a judgment for \$160, from which judgment this appeal was taken.

"It is an elementary rule of the law of personal property that no man can be deprived of it without his consent, or by operation of law. Another fundamental rule is that no one can sell a right which he does not have; that the purchaser takes nothing more than the rights of his vendor. With us the exceptions to this last rule arise only where the property is money or negotiable paper. In all other cases the purchaser cannot retain the property as against the owner unless it appear that the seller, by sale and delivery to him, though induced by fraudulent pretenses, had the indicia of title. Possession of personal property is indicative of title, but it is not title; and that alone will not protect the purchaser from the effects of a demand by the real owner."

Question 314: (1.) State the facts, the question presented and the Court's decision in the above case.

(2.) A was a jeweler. B asked him to let him take two diamond rings to his wife to see if she liked either one of them, and he would return them in two hours. B took the rings under this arrangement and pawned them to C. A brings replevin against C. Can he recover? (*Hatowski v. Cassriel*, 153 Ill. Ap. 239.)

(3.) A having a diamond ring he wished to sell, entrusted it to B, a street jewelry peddler, asking B to match it, or if he could not do so, to obtain an offer for it (giving the jeweler no express authority to sell it). B sold the stone wrongfully to C, and absconded with the money. A brings replevin against C. Can he recover? (*Levi v. Booth*, 58 Md. 305.)

Case No. 315. *Biggs v. Evans* (1894), 1 Q. B. 88.

Facts: The plaintiff was the owner of an opal matrix table-top which he intrusted to an agent who was a dealer in jewels and gems, and as a known part of his business sold jewels and gems for other people. The table top was intrusted to the agent on the terms it should not be sold to any person nor at any price without the plaintiff's authority and that the check received in payment should be handed to the plaintiff intact.

Point Involved: Whether placing an article in the

hands of a dealer in such articles, who also sells them for other people, to show to customers and secure offers thereon, estops the true owner to set up his title as against one to whom such article is sold in violation of authority.

WILLS, J., delivered the opinion of the Court: “* * * In one sense every person who intrusts an article to any person who deals in second-hand articles of that description enables him, if so disposed, to commit a fraud by selling it as his own. A man who lends a book in a second-hand bookseller puts it into his power in the same sense, to sell it as his own. A man who intrusts goods for safe custody to a wharfinger, who also deals in his own goods, or in other people’s goods intrusted to him for sale, in such a sense enables him to commit a fraud by selling them to a customer. But such a transaction clearly could not give a title to a purchaser as against the owner.”

Question 315: State the facts and the question presented and the Court’s decision in the above case, giving the illustrations stated by the Court.

Sec. 243. Allowing Another to Assert Ownership as Estoppel.

Case No. 316. O’Connor v. Clarke, 170 Pa. 318.

This was an action brought to recover possession of a wagon belonging to John O’Connor, and purchased by the defendant, Clarke, from one Tracy who was in possession of it. The evidence showed that Tracy was in possession of the wagon and had his name and occupation painted thereon, thus, “George Tracy, Piano Mover,” and that the owner, O’Connor, had directed this to be done and knew it was done, and that he did it for the purpose of creating an impression in the public that the property belonged to Tracy.

Point Involved: Whether an owner is estopped to

assert title by allowing another who is in possession of his personal property, to assert title to such property, as against one who purchases such property in reliance on such permitted assertions.

STERRETT, C. J., delivered the opinion of the Court: "While the soundness of the general rule of law that a vendee of personal property takes only such title or interest as his vendor has and is authorized to transfer cannot for a moment be doubted, it is not without its recognized exceptions. One of these is where the owner has so acted with reference to his property as to invest another with such evidence of ownership, or apparent authority to deal with and dispose of it, as is calculated to mislead, and does mislead, a good faith purchaser for value. In such cases the principle of estoppel applies, and declares that the apparent title or authority, for the existence of which the actual owner was responsible, shall be regarded as the real title or authority, at least so far as persons acting on the apparent title or authority, and parting with value, are concerned. Strictly speaking, this is merely a special application of the broad equitable rule that, where one of two innocent persons must suffer loss by reason of the fraud or deceit of another, the loss should fall upon him by whose act or omission the wrongdoer has been enabled to commit the fraud.

Question 316: (1.) State the facts, the question presented and the Court's decision in the above case.

(2.) Suppose that Tracy, in driving the wagon, had negligently injured a pedestrian, and such pedestrian had sued O'Connor, the true owner; assuming that otherwise there was no agency or employment, would the owner have been liable?

Sec. 244. Clothing Another With Documentary or Record Indicia of Title.

(See also subject *Document of Title*.)

Case No. 317. Calais Steamboat Co. v. Scudder, 2 Black. 372.

Facts: Scudder, the administrator of John Van Pelt, filed a bill against the Steamboat Company, claiming title to 13/20 of the steamer Adelaide, as a part of the estate of Van Pelt. Defense was that the defendants were innocent purchasers for value from one William Vanderbilt of New York City. The evidence showed that John Van Pelt, of California, in 1853 employed Vanderbilt, an engineer and constructor of steamers, to go to New York and there make contracts and superintend the construction of the steamer in question with Van Pelt's money. The contracts were to be made in Vanderbilt's name, and the builder's certificate was to be taken and the enrollment at the custom house to be in Vanderbilt's name. These instructions were given to Vanderbilt by Van Pelt with the avowed purpose of concealing his own name in the construction of the vessel, he not wishing it to be known he had any interest in the vessel. The vessel was built by Vanderbilt in his name pursuant to these instructions. The Steamboat Company, wishing a boat, saw this one advertised in the daily papers, and after the usual negotiations as to price, purchased it for the sum of \$93,000.00, paying down \$88,000.00 cash.

Point Involved: Whether an owner who permits another to put the record or documentary title in himself is estopped to assert title as against innocent third persons who purchase for value in reliance on such record or documentary title.

MR. JUSTICE NELSON delivered the opinion of the Court: " * * * Upon this simple statement of the case, it is not to be doubted but that the legal title to this vessel passed to the purchasers, for, although as between Vanderbilt and Van Pelt, his principal, or the estate of Van Pelt, the legal title could not avail, beyond a lien for his services, or for any advances, yet, as it respects third persons, who have bought in good faith and for a valuable consideration, the rule is different. The question then arises between two innocent parties, and the equity

of the case turns against the party who has enabled his agent or any other person to hold himself forth to the world *as having not only possession, but the usual documentary evidence of property in the article.* * * *

“The case furnishes a very strong illustration of this principle. All the indicia of property in this vessel in Vanderbilt existed from no fault of his, for he was clothed with it by the express authority of the principal. Van Pelt, therefore, took upon himself knowingly the responsibility of vesting the property of the vessel in Vanderbilt, as he must have known that it was in his power to deal with it as owner. Besides, he was extensively engaged in the business of steamboats in the waters of California, and doubtless understood, in point of fact, the responsibility he was assuming * * * and, we may add, we are not sorry that we have come to a conclusion in favor of the innocent party who has acted upon the evidence of the legal title of the party from whom the purchase was made against the other innocent party who had not only been instrumental in furnishing this evidence, but has industriously concealed his own, and thus turned the equity of the case against him. * * *”

Question 317: State the facts, the question presented and the Court's decision in this case.

B. Provisions of Recording Acts, Factors' Acts, etc.

§ 245. Recording acts.

§ 247. Bulk sales laws

§ 246. Factors' acts.

Sec. 245. Recording Acts.

(Note: The recording acts of the various states cover, particularly, the cases of chattel mortgages and conditional sales. It is provided, with respect to chattel mortgages, that they must be acknowledged before a certain officer and recorded in the public records in order that the mortgagee can assert his lien against innocent purchasers for value, judgment and attaching creditors and the like unless he takes possession of the mortgaged goods.

Likewise, in reference to conditional sales, it is provided in most of the states that the conditional sale in which the buyer takes possession must be recorded in order to protect the seller. Before the conditional sale recording acts were passed, it was generally held that a vendor in a conditional sale could assert his title against innocent third persons. See cases on the difference between conditional sales and consignments.)

Sec. 246. Factors' Acts.

(Note: A factor having possession of goods has large authority to sell them in accordance with the customs of the community, but though apparently the owner has no power to pledge the goods for his own debts. Many of the states have passed Factor's Acts, varying in their phraseology, protecting purchasers and pledgees of factors. See Williston on Sales, Sections 318 ff.)

Sec. 247. Bulk Sales Laws.

Case No. 318. The G. S. Johnson Co. v. Beloosky, 263 Ill. 363.

Facts: Stated in the opinion.

Point Involved: The constitutionality of the Bulk Sales Act of Illinois, with the text of that act, and the object thereof.

MR. JUSTICE VICKERS delivered the opinion of the Court: "Ernest Pilatt was engaged in the baker business and used in connection therewith a delivery wagon and a team of horses. He made a bill of sale covering his entire stock in trade, store fixtures and the wagon and team used in connection with the business, to Rossie Beloosky. Subsequently the G. S. Johnson Company, being a creditor of Pilatt, levied an attachment upon the goods and chattels sold to appellee, basing the attachment upon the failure to comply with an act of the legislature known as the Bulk Sales Act of 1913. It is admitted that no attempt was made to comply with the act in making the sale. The sole question presented for our determination is the constitutionality of the Bulk Sales

Act of 1913. The Court below held the act to be invalid and gave judgment for the defendant. The plaintiff in the attachment proceeding has prosecuted an appeal direct to this Court.

“The Bulk Sales Act passed in 1913 is entitled, ‘An act to regulate the sale or transfer of goods, wares, merchandise, or merchandise and fixtures or other goods and tain penalties in connection therewith.’ The act, which is found at page 258 in the Laws of 1913, is as follows:

“‘Sec. 1. That the sale, transfer, or assignment in bulk of the major part or the whole of a stock of merchandise, or merchandise and fixtures or other goods and chattels of the vendor’s business, otherwise than in the ordinary course of trade and in the regular and usual prosecution of the vendor’s business shall be fraudulent and void as against the creditors of the said vendor, unless the said vendee shall, in good faith, at least five (5) days before the consummation of such sale, transfer or assignment demand and receive from the vendor a written statement under oath of the vendor or a duly authorized agent of the vendor having knowledge of the facts, containing a full, accurate and complete list of the creditors of the vendor, their addresses and the amounts owing to each as near as may be ascertained, and if there be no creditors, a written statement under oath to that effect; and unless the said vendee shall at least five days before taking possession of said *goods and chattels* and at least five days before the payment or delivery of the purchase price, or consideration or any evidence of indebtedness therefor, in good faith, deliver or cause to be delivered or send or cause to be sent personally or by registered letter properly stamped, directed and addressed, a notice in writing to each of the creditors of the vendor named in the said statement or of whom the said vendee shall have knowledge, of the proposed purchase by him of the said *goods and chattels* and of the price, terms and conditions of such sale: Provided, however, that it shall be lawful for the vendee to pay to the vendor so much of the purchase price as shall be in

excess of the total amount of the indebtedness of the vendor before the expiration of the five days herein referred to.

“‘Sec. 2. [Provides that knowingly making a false statement is a crime and subject to fine and imprisonment.]

“‘Sec. 3. [Provides that act shall include corporations, associations, partnerships, and individuals, but shall not apply to sales by executors, administrators, trustees in bankruptcy or any public officer under judicial process, nor to sales of exempt property, nor to sales made in regular course of business, nor to public auction sales where advertised in a newspaper or in five public places at least ten days before the sale.]’

“* * * The legislature may, under the police power, pass such laws as it deems necessary for the suppression of fraud. The reasonableness of the act and the necessity for its enactment are legislative questions, with which the courts have no concern. Statutes of the same general character as the one here involved have frequently been before the courts of the different states and they have been sustained by the decided weight of authority. We do not deem it necessary to cite these cases. Many of them will be found cited in a note to *Off & Co. v. Morehead*, in volume 14 of *American and English Annotated Cases*, 434.

“The Court below erred in holding the act of May 3, 1913, unconstitutional.

“The judgment of the county court of Rock Island county is reversed and the cause remanded.”

Question 318: (1.) What action did the plaintiffs take in this case? Under what authority?

(2.) What are the purposes of a bulk sales law?

C. Sale by One Having Voidable Title.

Sec. 248. Sale by One Having Voidable Title.

Case No. 319. Uniform Sales Act, Sec. 24.

(See page 591, *post.*)

Question 319: (1.) A sells goods to B, who procures them by fraud, which would give A the right to rescind. Before A rescinds, B sells to C for value, who does not know of the fraud. A sues C in trover (or brings replevin). Can A recover? *Root v. French*, 13 Wend. (N. Y.) 570.

(2.) A sends goods to B "on sale and return." B sells to C, an innocent purchaser, for value. Can A recover against C?

(3.) A sends goods to B on approval, and B sells to C. Can A recover against C?

D. Retention of Possession by the Seller as Fraud Against Creditors and Subsequent Purchasers of the Seller.

Sec. 249. Retention of Possession as Fraud.

Case No. 320. Uniform Sales Act, Secs. 25, 26.

(See page 591, *post.*)

Case No. 321. *Wilson v. Walrath*, 103 Minn. 412, 24 L. R. A. N. S. 1127.

Facts: One Spargo sold an automobile to Wilson, who paid full consideration therefor, but who agreed to allow Spargo, who was an automobile sales agent, to retain possession of the machine for demonstration purposes, as Wilson had to be away from home for a time, and otherwise would have had to store the machine. While in such possession Spargo mortgaged the machine to Walrath, who had no knowledge of the sale to Wilson. Wilson brings replevin proceedings. Walrath claims that by allowing Spargo to remain in possession, the sale by Spargo to Wilson became in law fraudulent and void as to third persons relying on the evident ownership indicated by such possession.

Point Involved: Whether allowing the seller of a chattel to remain in possession thereof after the sale, makes the sale void as to subsequent purchasers or creditors of the seller.

ELLIOTT, J.: " * * *

"1. There is a line of cases which holds that, while delivery is not essential to pass title as between the

vendor and vendee of personal property, it is necessary for such purpose as against everyone but the vendor. Under this rule, when the same goods are sold to different persons by conveyances equally valid, he who first lawfully acquires the possession will hold them as against the other. The motives and intentions of the parties are immaterial, as the doctrine rests upon the general principle that, where one of two innocent persons must suffer, the loss should fall on him whose acts or omissions have made or contributed to make the loss possible. *Lanfear v. Sumner*, 17 Mass. 110, 9 Am. Dec. 119; *Crawford v. Forristall*, 58 N. H. 114; *Burnell v. Robertson*, 10 Ill. 282; *Stephens v. Gifford*, 137 Pa. 219, 21 Am. St. Rep. 868, 20 Atl. 542; *Norton v. Doolittle*, 32 Conn. 405. For other cases, see 2 *Mechem on Sales*, § 981. Closely connected with this doctrine, but resting on other principles, is the rule which makes the retention of possession by the vendor conclusive evidence of fraud. This doctrine also rests upon grounds of assumed public policy. It prevails by virtue of statutes or decisions based on the common law in a number of states. 2 *Mechem, Sales*, § 984; 20 *Cyc. Law & Proc.*, p. 539, note 13. In the greater number of states, however, the rule is established that the mere retention of possession by the vendor is presumptive evidence only of a fraudulent and colorable sale, and the vendee is permitted to overthrow this presumption by evidence which establishes his good faith and want of knowledge of any fraudulent intent on the part of the vendor. 20 *Cyc. Law & Proc.*, pp. 536 *et seq.* The statutes are referred to in the notes to 2 *Mechem on Sales*, §§ 960, 961.

“2. In the thirteenth year of Elizabeth, there was enacted the famous statute which made all conveyances not made *bona fide* and for value, with intent to injure and delay or defraud the creditors, void as to such creditors. Stat. 13 Eliz., chap. 5. A later statute extended this protection to subsequent purchasers as well as creditors. Stat. 27 Eliz., chap. 4. These statutes did not in terms apply to personal property, but from the time of

Sir Edward Coke's decision in *Twyne's Case*, 3 Coke, 80b, 5 Eng. Rul. Cas. 2, sales of personal property, made with intent to delay and defraud creditors or subsequent purchasers, have been regarded as within the provisions of the statutes. The question soon arose whether, under these statutes, possession by the vendor was fraudulent *per se*, and therefore conclusive, or merely presumptively fraudulent. In *Twyne's Case*, in speaking of the indicia of fraud, it was said that 'continuance of the possession in the donor is the sign of trust for himself.' In *Edwards v. Harben*, 2 T. R. 587, it was held that, 'if there be nothing but the absolute conveyance, without the possession, that, in point of law, is fraudulent.' For some time thereafter this was the established rule in the English courts, but it was finally held that the proper construction of the statute made such a conveyance presumptively fraudulent only. *Hale v. Metropolitan Saloon Omnibus Co.*, 28 L. J. Ch. N. S. 777; *Gregg v. Holland*, (1902) 2 Ch. 360. To clear up the difficulty which arose under the statute, Parliament enacted the various bills of sale acts, which are fully discussed and explained by Lord Blackburn in *Cookson v. Swire* (1884) L. R. 9 App. Cas. 653, 670. See also references to these acts and decisions thereunder in notes to the fifth English edition of Benjamin on Sales, p. 496, and appendix, p. 1029, and in the note to *Twyne's Case* in 5 Eng. Rul. Cas. 27-39. See also Mr. Bennett's note to the sixth American edition of Benjamin on Sales, pp. 458-462, and Jones, Chat. Mortg. §§ 320 *et seq.* In the United States, *Edwards v. Harben* was followed by Chancellor Kent in *Sturtevant v. Ballard*, 9 Johns. 337, 6 Am. Dec. 281, and by the Supreme Court of the United States, in *Hamilton v. Russell*, 1 Cranch, 309, 2 L. ed. 118. But in *Warner v. Norton*, 20 How. 488, 15 L. ed. 950, Mr. Justice McLean stated that 'for many years past the tendency has been in England and in the United States to consider the question of fraud as a fact for the jury, under the instruction of the Court.' This is now the established doctrine of the Court. *Jewell v. Knight*, 123 U. S. 426, 31 L. ed. 190,

8 Sup. Ct. Rep. 193; *Smith v. Craft*, 123 U. S. 436, 31 L. ed. 267, 8 Sup. Ct. Rep. 196. See note to 18 L. R. A. 604.

“Section 3496, Rev. Laws 1905, and the previous statutes which are embodied therein, were enacted for the purpose of removing any doubts as to whether the retention of possession by the vendor is conclusive or only presumptive evidence of fraud. It provides in express terms that such possession shall be presumed to be fraudulent and void as against subsequent purchasers in good faith, unless those claiming under such sale make it appear that the sale was made in good faith, and without any intent to defraud such purchasers. The effect is to cast upon the vendee the burden of rebutting the statutory presumption of fraudulent intent by proving his own good faith and want of knowledge of fraudulent intent on the part of the vendor. *Leqve v. Smith*, 63 Minn. 24, 65 N. W. 121. The statute controls this case. If Wilson proved that he purchased the machine in good faith, without knowledge of any intent on the part of Spargo to defraud his creditors or subsequent purchasers, he was entitled to the possession of the property. [Here the Court considers the evidence.]

“It is not contended that there was any actual bad faith on the part of Wilson. In his brief, the respondent thus states his position: The sale was not accompanied with immediate delivery and followed by an open and continuous change of possession, within the meaning of § 3496 Rev. Laws 1905; and hence, ‘while in this case it may be true that on April 25, 1906, appellant, in the utmost good faith, purchased the automobile, yet, from that time on, the action of the appellant in permitting and agreeing to allow Mr. Spargo, the vendor, to keep and use that machine in exactly the same manner after the sale as before, was a fraud *per se* upon any person who might either purchase or take the same as security without notice of the rights of a prior purchaser.’ This is the doctrine of *Lanfear v. Sumner*, 17 Mass. 110, 9 Am. Dec. 119, and the other cases of the group to which reference

has been made. As an abstract principle of law, that doctrine is sound and controlling when applied to appropriate facts and conditions. But the effect which shall be given to possession under the particular circumstances disclosed in this record is declared by the statute, and the statute should not be disregarded and annulled by the application of the doctrine of equitable estoppel. Upon the evidence, Wilson sustained the burden which the statute imposes upon him, and the finding of the trial court was thus erroneous."

Question 321: (1.) State the facts in this case, the question presented and what the Court held.

(2.) What two doctrines are there on the effect of retention by the seller of the goods sold?

(3.) What was the early English statute? What did it provide?

(4.) What did *Twyne's case* hold? *Edwards v. Harben*? Was the early English doctrine adhered to in England?

(5.) In the above case, on whom was the burden of proof in reference to good faith? Why? How was this burden sustained?

Case No. 322. *Ticknor v. McClelland*, 84 Ill. 471.

Facts: "A" sold "B" 135 acres of standing corn, three stacks of hay, seven machines, four horses and twenty-nine hogs. All of these items were selected and segregated, but no possession was taken at the time. Before "B" took possession, "C," a creditor of "A," had the property seized by the sheriff. The sheriff took possession and "B" brought replevin.

Point Involved: Same point as in above case; the other view taken; whether the rule applies to growing grain, ponderous articles, etc., not capable of immediate removal.

MR. CHIEF JUSTICE SHELDON delivered the opinion of the Court: "As regards the standing corn and stacks of hay, we consider the delivery of possession sufficient. In case of the sale of standing crops, the possession is

in the vendee until it is time to harvest them, and until then he is not required to take manual possession of them. * * * Where goods are ponderous and incapable of being handed over from one to another, there need not be a manual delivery of them. * * * As to the rest of the property which was the subject of the sale, it was that character of property that was capable of being immediately and readily removed, and a different rule governs.

“The policy of the law in this state will not permit the owner of personal property to sell it, and still continue in the possession of it. Possession being one of the strongest evidences of title to personal property, if the real ownership is suffered to be in one, and the apparent ownership in another, the latter gains credit as owner, and is enabled to practice deceit upon mankind. It is the well-established doctrine of this Court, that an absolute sale of personal property, where the possession is permitted to remain with the vendor, is fraudulent *per se*, and void as to creditors and purchasers. * * *

“We can come to no other conclusion, than that suffering this portion of property, which was capable of being readily removed, to remain with the vendor, as was done, rendered the sale of it fraudulent in law, and void as to creditors, and that it was subject to the levy of the execution.”

Question 322: (1.) State the facts, the question presented and the Court's decision in this case.

(2.) Is it in accord with *Wilson v. Walrath*?

CHAPTER FORTY-TWO

DOCUMENTS OF TITLE

(Note: The provisions of the Sales Act are here referred to on this subject, without cases, but with some brief explanatory notes.)

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| § 250. What is a document of title. | § 258. Right of person to whom document has been transferred. |
| § 251. Negotiable document of title defined. | § 259. Transfer of negotiable document without indorsement. |
| § 252. Negotiation of negotiable documents by delivery. | § 260. Warranties on sale of document. |
| § 253. Negotiation of negotiable documents by indorsement. | § 261. Indorser not a guarantor. |
| § 254. Negotiable document marked "not negotiable." | § 262. When negotiation not impaired by fraud, mistake or duress. |
| § 255. Transfer of non-negotiable documents. | § 263. Attachment or levy on the goods represented by negotiable document. |
| § 256. Who may negotiate a document. | § 264. Creditors' remedies to reach negotiable documents. |
| § 257. Rights of persons to whom document has been negotiated. | |

Sec. 250. What is a Document of Title.

(Note: A "document of title" is a document which constitutes proof of the possession of the goods by a certain person and constitutes the authority by which the goods may be received from such person. It includes bills of lading and warehouse receipts, dock warrants, etc. It is a document that *represents* the goods. A mere *bill of sale* is not within the meaning here a document of title, unless it partakes of the character of the documents of title mentioned above. In *real estate law*, the *deed* is the document of title, so that we see the term is dif-

ferently used in real estate and personal property law. The essential thing to be borne in mind is that the goods are in the possession of a certain person (A) and a document asserting such possession has been issued, by which the goods may be obtained. They are chiefly of two sorts: bills of lading and warehouse receipts.

We must not confuse *negotiable* documents of title with *negotiable instruments*, which are bills of exchange, promissory notes and bank checks. They call for the payment of *money*, and are governed by a separate body of law. See *post*, Division IV.)

Sec. 251-253. Negotiable Documents and Their Negotiation.

Cases No. 323, 324, 325. Uniform Sales Act, Secs. 27, 28, 29.

Uniform Sales Act, §§ 27, 28, 29.

(See page 592, *post*.)

(Note: Bills of lading and warehouse receipts are by the common law assignable—not negotiable, no matter in what form they might be drawn. The Uniform Bills of Lading Act, the Uniform Warehouse Receipt Act and the Uniform Sales Act now adopted in a number of states make bills of lading and warehouse receipts negotiable if drawn to order or to bearer (“order” bills and receipts) and not negotiable if drawn to a person direct (“straight” bills and receipts). These acts it must be remembered are not yet in force in many states.)

Questions 323-325: (1.) When is a negotiable document of title negotiable by one delivery?

(2.) How may such a document be made by the holder negotiable by indorsement only?

(3.) In such a case, could the document again become negotiable by delivery?

Sec. 254 to Sec. 264. The Law of Documents of Title.

Cases No. 326 to 336. Uniform Sales Acts, Secs. 30 to 40.
(See page 592, *post*.)

Question 326: If a document of title is marked “not-negotiable,” what effect does that have on documents where the Uniform Sales Act is in force?

Question 327: If a document of title is non-negotiable, may it be transferred? What will be the effect of this transfer?

(Note: This section means that if a document of title is in negotiable form, but by reason of its form, or a prior indorsement, requires indorsement to transfer it as a negotiable document, it may, nevertheless, be transferred without indorsement, in that case giving the transferee (purchaser or donee) the same sort of rights as he would have were the document non-negotiable, that is, merely assignable. And if the bill of lading is a straight bill it may be *transferred*, but cannot be *negotiated*, even though indorsed.)

Question 328: Who may negotiate a document?

Question 329: State the rights of a person to whom a negotiable document has been negotiated, as determined by the Uniform Sales Act.

Question 330: Where a document has been transferred, but not negotiated (i. e., either transferred without indorsement where indorsement required in case of a negotiable document or transferred in case of a non-negotiable document), what right does the transferee acquire against the transferror?

Question 331: Where indorsement is essential to negotiation and has been omitted, what right has the transferee? In such a case, when does negotiation take effect?

Question 332: State the warranties of one who sells a document of title?

Question 333: Does indorsement of a negotiable document of title make the indorser liable for the failure of prior parties to fulfil their obligations?

Question 334: State the substance of Sec. 38, Uniform Sales Act.

Question 335: State the substance of Sec. 39, Uniform Sales Act.

Question 336: State the substance of Sec. 40, Uniform Sales Act.

PART XI

PERFORMANCE OF THE CONTRACT

CHAPTER FORTY-THREE

THE PERFORMANCE OF THE CONTRACT

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| § 265. Obligation of seller to deliver and buyer to pay for goods. | § 270. Delivery to carrier. |
| § 266. Delivery and payment as concurrent conditions. | § 271. Right to examine the goods. |
| § 267. Place, time and manner of delivery. | § 272. What constitutes acceptance. |
| § 268. Delivery of wrong quantity. | § 273. Acceptance as waiver of damages. |
| § 269. Delivery in instalments. | § 274. Duty of buyer upon rightful rejection of goods. |
| | § 275. Buyer's liability for failure to accept. |

Sec. 265. Obligation of Seller to Deliver and Buyer to Pay for Goods.

Case No. 337. Uniform Sales Act, Sec. 41.

“It is the duty of the seller to deliver the goods, and of the buyer to accept and pay for them, in accordance with the terms of the contract to sell or sale.”

Question 337: State this section.

Sec. 266. Delivery and Payment as Concurrent Conditions.

Case No. 338. Uniform Sales Act, Sec. 42.

“Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions; that is

to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price and the buyer must be ready and willing to pay the price in exchange for the possession of the goods.”

Question 338: State this section.

Sec. 267. Place, Time and Manner of Delivery.

Case No. 339. Uniform Sales Act, Sec. 43.

(See page 594, *post.*)

Question 339: (1.) Is the obligation on the seller to deliver the goods or the buyer to send for them?

(2.) What is to be deemed the place of delivery?

(3.) What is the rule where goods are in the possession of a third person?

(4.) What do subsections (4) and (5) provide?

Case No. 340. *Cash v. Hinkle*, 36 Iowa, 623.

Facts: A contracted to sell B certain hogs deliverable at a certain place. At the time and place he had certain hogs there which did not comply with the contract and B refused to receive them. A then told B he might go into pens belonging to A and select other hogs. This B refused to do, and he refused to accept any of the hogs which A had at the place.

Point Involved: The obligation of the seller to deliver the goods.

MILLER, J., delivered the opinion of the Court:
 “* * * It was the duty of the plaintiff to have the kind and number of hogs specified in the contract at the place of delivery, *ready to deliver them to the defendant*. The latter was not required to go into another lot of hogs * * * and select therefrom such hogs as would make the lot plaintiff had agreed to deliver, comply with the contract. It was the business of the plaintiff to do this. * * * It was the duty of the plaintiff to have the hogs at the time and place of delivery, set apart and

designated for that purpose, unless this was excused by a refusal to receive. * * *

Question 340: What were the facts, the question presented and the Court's decision in this case?

Sec. 268. Delivery of Wrong Quantity.

Case No. 341. Uniform Sales Act, Sec. 44.

(See page 595, *post.*)

Question 341: (1.) What difference in amount of recovery does it make where the seller does not deliver the amount his contract calls for and the seller accepts, knowing of the breach, or accepts not knowing of the breach?

(2.) If the seller sends a larger quantity than the contract calls for, what are the buyer's rights?

Case No. 342. *Richards v. Shaw*, 67 Ill. 222.

Facts: A, in March, 1867, contracted to deliver to B on or before May 5, 1867, 500 bushels of corn at 50 cents per bushel. He did deliver 30 bushels in April, delivered none at all in May and 361 bushels in June, all of which deliveries B accepted.

Point Involved: Whether a seller who sends less than he contracts to deliver, can recover and if so, how much?

MR. JUSTICE SHELDON delivered the opinion of the Court: " * * * There was a manifest failure on the part of Shaw to complete his contract, yet we are inclined to hold that he was entitled to his action, as upon an implied contract, for the portion of corn he did deliver. It is a rule supported by a very respectable weight of modern authority, that, if the vendee of a specific quantity of goods sold under an entire contract, receive a part thereof, and retain it after the vendor has refused to deliver the residue, this is a severance of the entirety of the contract, and the vendee becomes liable to the vendor, for the price of such part; but he may reduce the vendor's

claim by showing that he has sustained damage by the vendor's failure to fulfill his contract. * * *

Question 342: State the facts, the question presented and the Court's decision in this case.

Case No. 343. Perry v. Mt. Hope Iron Co., 16 R. I. 318.

Facts: See the opinion.

Point Involved: Whether a tender of a larger amount than the contract called for is a tender of fulfillment of the contract.

Per Curiam: "The contract, for the breach of which this action was brought, was entered into in manner following, to-wit: The plaintiff offered the defendant some nut and bolt shop scraps, saying he had 30 or 40 tons to sell. The defendant offered to give 87½ cents per hundred weight if the plaintiff would deliver it on the defendant's wharf. This offer of the defendant was accepted the next day. The plaintiff carried to the defendant's wharf 53 17/30 tons and tendered it to the defendant. * * * At the trial the defendant * * * took the objection that a tender of 53 17/30 tons was not a tender in fulfillment of a contract of 30 or 40 tons. The jury returned a verdict for the plaintiff and the defendant now moves for a new trial. * * *

"We think the defendant is entitled to a new trial. The contract for the sale of 30 or 40 tons would naturally be understood to mean a contract for between 30 or 40 tons, or, at most, for a quantity not much exceeding 40 tons. Fifty-three tons is so much more than 40 tons that we do not think that the jury were warranted in finding that the defendant agreed to purchase that amount. The cases cited for the defendant show that as a general rule the buyer is entitled to refuse the whole of the goods tendered if they exceed the quantity agreed on; and the vendor has no right to insist upon the buyer's acceptance of all or upon the buyer's selecting out of a larger quantity than delivered. * * *

Question 343: State the facts, the question presented and the Court's decision in this case.

Case No. 344. Moore v. U. S., 190 U. S. 157.

Facts: A sold to the United States "about 5,000 tons" of coal to be delivered by a certain date at Honolulu. A brought the coal in lots until he had delivered 4,634 tons. He then in apt time delivered 366 tons more which the United States refused to receive. A brought a claim against the United States for breach of contract.

Point Involved: The amount of goods which the seller can insist on the buyer receiving where the contract calls for "about" a certain quantity; meaning of "about" where it qualifies the amount contracted for.

MR. JUSTICE McKENNA delivered the opinion of the Court: " * * * the appellant agreed to deliver and the United States agreed to receive 'about 5,000 tons' of coal, delivery to commence with about 2,200 tons, to arrive at Honolulu on or about the 1st day of October, 1898. By the 7th of October delivery was made of 4,634 tons. About a month subsequently appellant purchased 366 tons of coal of a ship then in the harbor, and tendered the coal to the United States in fulfillment of the contract to deliver 5,000 tons. The United States refused to receive it, and appellant sold it in the open market for \$3.06 $\frac{1}{4}$ per ton less than \$9, the contract price. This was the best price which could be obtained, and the loss to appellant was \$1,120.87. The court of claims held that the appellant was not entitled to recover. We think this was error. The obligations of parties were reciprocal; one to deliver, the other to receive, about 5,000 tons of coal, and equally reciprocal is the liability for non-performance of the obligations. The only question can be, Is 366 tons less than 5,000 tons, 'about 5,000 tons?' We think not. The difference is too great. We said in *Brawley v. United States*, 96 U. S. 168, 172, * * * that in engagements to furnish goods to a certain amount the quantity specified is material and governs the contract.

‘The addition of the qualifying words, about, more or less, and the like, in such case, is only for the purpose of providing against accidental variations arising from slight and unimportant excesses or deficiencies in number, measure, or weight.’ * * *

“The record does not inform us why the United States refused the tender, and we must assume that it had no other justification than its supposed right under the contract.

“Judgment reversed and cause remanded with directions to enter judgment for appellant (claimant) in the sum of \$1,120.87.”

Question 344: State the facts, the defense raised and the Court’s decision in this case.

Case No. 345. Robinson v. Noble’s Adm’rs, 33 U. S. 181.

A sold B a quantity of goods, “supposed to amount to 3,700 barrels then in the Steamboat Paragon,” for which B agreed to pay \$1.50 per barrel. There were in fact only 3,105 barrels. B sued A for breach of his contract.

Point Involved: Whether when a lot of goods are sold described as “supposed to amount to” certain quantity, the words are a statement of quantity or mere words of identity or description.

MR. JUSTICE McLEAN delivered the opinion of the Court, saying in part: “* * * The plaintiff’s counsel insist that Robinson was bound by this agreement to deliver the number of barrels specified, subject only to a reasonable qualification of the words ‘supposed to amount to thirty-seven hundred barrels’ and that by this rule the number could not be reduced below thirty-six hundred barrels.

It is clear from the agreement that the amount of freight was not ascertained, and that Robinson *did not covenant to deliver any specific number of barrels*. It was conjectured there were thirty-seven hundred, and

the payment for the transportation was to be at the rate of one dollar and fifty cents per barrel.

“* * *

“If Robinson had bound himself to deliver a certain number of barrels and had failed to do so, Noble would have been entitled to damages for such failure; but a fair construction of the contract imposed no such obligation on Robinson and consequently the breach assigned in the declaration is not within the covenant.

“* * *

“When the circumstances under which this contract was made are considered, the contingencies on which the delivery of the freight in some degree depended; the reason is seen why cautions and indefinite language was used in regard to the number of barrels in the contract. And the result proved the caution was judicious.

* * *

Question 345: State the facts in this case, the question presented and the Court's decision.

(2.) A sells B a heap of coal lying at the mouth of A's mine, “being about 100 tons.” There are, in fact, only 80 tons. B refuses to accept. Can A recover on the contract? Does this case differ from Case No. 344? Suppose A had known there were only 80 tons?

Sec. 269. Delivery in Installments.

Case No. 346. Uniform Sales Act, Sec. 45.

(See page 595, *post.*)

Question 346: What determines whether a breach of the contract in respect to one installment is a breach of the entire contract?

Case No. 347. *Norrington v. Wright*, 115 U. S. 188.

Facts: Suit brought by Arthur Norrington, trading as A. Norrington & Co., a citizen of Great Britain, against James A. Wright and others, citizens of Pennsylvania, trading as Peter Wright & Sons, upon a contract by which Norrington sold to Peter Wright & Sons “5,000 tons old T

iron rails, for shipment from a European port or ports at the rate of about one thousand tons per month, beginning February, 1880, but whole contract to be shipped before August 1, 1880, at \$45.00 per ton of 2,240 pounds, custom house weight, ex ship Philadelphia; settlement cash, on presentation of bills accompanied by custom house certificate of weight." Under this contract the plaintiff shipped 400 tons by one vessel in the last part of February, 885 tons in two vessels in April, 850 tons by three vessels in May, 1,000 tons by two vessels in June, and 300 tons by one vessel in July. The defendants received and paid for the February shipment, upon its arrival in March, and in April gave directions at what wharves the March shipments should be discharged. But on May 14, about the time of the arrival of the March shipments, and having been then for the first time informed of the amounts shipped in February, March and April, gave the broker, Etting, written notice that they should decline to accept the shipments made in March and April because none of them were in accordance with the contract, and wrote to the effect that the 400 tons accepted by them was accepted supposing it was only a parcel of the entire shipment. On the trial plaintiff contended (1st) that under the contract he had six months to ship the 5,000 tons, and any deficiencies in the earlier months could be made up subsequently, provided that defendants could not be compelled to accept more than 1,000 tons in any one month; (2nd) that if this were not so, the contract was a divisible contract, and the remedy of the defendants for a default in any one month was not by rescission of the whole contract, but only by deduction of the damages caused by the delays in shipments.

Point Involved: Whether the contract was of such an indivisible nature that a breach as to any one installment was a breach of the entire contract, discharging the purchaser of his obligation to accept future installments.

MR. JUSTICE GRAY delivered the opinion of the Court:
"In the contracts of merchants, time is of the essence.

The time of shipment is the usual and convenient means of fixing the probable time of arrival, with a view of providing funds to pay for the goods, or of fulfilling contracts with third persons. A statement descriptive of the subject-matter, or of some material incident, such as the time or place of shipment, is ordinarily to be regarded as a warranty, in the sense in which that term is used in insurance and maritime law, that is to say, a condition precedent, upon the failure or nonperformance of which the party aggrieved may repudiate the whole contract. *Behn v. Burness*, 3 B. & S. 751; *Bowes v. Shand*, 2 App. Cas. 455; *Lowber v. Bangs*, 2 Wall. 728; *Davison v. Von Lingen*, 113 U. S. 40.

“The contract sued on is a single contract for the sale and purchase of 5,000 tons of iron rails, shipped from a European port or ports for Philadelphia. The subsidiary provisions as to shipping in different months, and as to paying for each shipment upon its delivery, do not split up the contract into as many contracts as there shall be shipments or deliveries of so many distinct quantites of iron. *Mersey Co. v. Naylor*, 9 App. Cas. 434, 439. The further provision, that the sellers shall not be compelled to replace any parcel lost after shipment, simply reduces, in the event of such a loss, the quantity to be delivered and paid for.

“The times of shipment, as designated in the contract, are ‘at the rate of about 1,000 tons per month, beginning February, 1880, but whole contract to be shipped before August 1, 1880.’ These words are not satisfied by shipping one-sixth part of the 5,000 tons, or about 833 tons, in each of the six months which begin with February and end with July. But they require about 1,000 tons to be shipped in each of the five months from February to June inclusive, and allow no more than slight and unimportant deficiencies in the shipments during those months to be made up in the month of July. The contract is not one for the sale of a specific lot of goods, identified by independent circumstances, such as all those deposited in a certain warehouse, or to be shipped in a particular vessel,

or that may be manufactured by the seller, or may be required for use by the buyer, in a certain mill—in which case the mention of the quantity, accompanied by the qualification of ‘about,’ or ‘more or less,’ is regarded as a mere estimate of the probable amount, as to which good faith is all that is required of the party making it. But the contract before us comes within the general rule: ‘When no such independent circumstances are referred to, and the engagement is to furnish goods of a certain quality or character to a certain amount, the quantity specified is material, and governs the contract. The addition of the qualifying words “about,” “more or less,” and the like, in such cases, is only for the purpose of providing against accidental variations, arising from slight and unimportant excesses or deficiencies in number, measure or weight.’ *Brawley v. United States*, 96 U. S. 168, 171, 172.

“The seller is bound to deliver the quantity stipulated, and has no right either to compel the buyer to accept a less quantity, or to require him to select part out of a greater quantity; and when the goods are to be shipped in certain proportions monthly, the seller’s failure to ship the required quantity in the first month gives the buyer the same right to rescind the whole contract, that he would have had if it had been agreed that all the goods should be delivered at once.

“The plaintiff, instead of shipping about 1,000 tons in February and about 1,000 tons in March, as stipulated in the contract, shipped only 400 tons in February, and 885 tons in March. His failure to fulfil the contract on his part in respect to these first two installments justified the defendants in rescinding the whole contract, provided they distinctly and seasonably asserted the right of rescission.

“The defendants, immediately after the arrival of the March shipments, and as soon as they knew that the quantities which had been shipped in February and in March were less than the contract called for, clearly and positively asserted the right to rescind, if the law entitled

them to do so. Their previous acceptance of the single cargo of 400 tons shipped in February was no waiver of this right, because it took place without notice, or means of knowledge, that the stipulated quantity had not been shipped in February. The price paid by them for that cargo being above the market value, the plaintiff suffered no injury by the omission of the defendants to return the iron; and no reliance was placed on that omission in the correspondence between the parties.

“The case wholly differs from that of *Lyon v. Bertram*, 20 How. 149, in which the buyer of a specific lot of goods accepted and used part of them with full means of previously ascertaining whether they conformed to the contract.

“The plaintiff, denying the defendants’ right to rescind, and asserting that the contract was still in force, was bound to show such performance on his part as entitled him to demand performance on their part, and, having failed to do so, cannot maintain this action.

“For these reasons, we are of opinion that the judgment below should be affirmed.”

Question 347: State the facts, the question presented and the Court’s decision in this case.

Sec. 270. Delivery to a Carrier on Behalf of the Buyer.

Case No. 348. Uniform Sales Act, Sec. 46.

“(1) Where, in pursuance of a contract to sell or a sale, the seller is authorized or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer is deemed to be a delivery of the goods to the buyer, except in cases provided for in section 19, Rule 5, or unless a contrary intent appears.

“(2) Unless otherwise authorized by the buyer, the seller must make such contract with the carrier on behalf of the buyer as may be reasonable, having regard to the nature of the goods and the other circumstances of the

case. If the seller omit so to do, and the goods are lost or damaged in course of transit, the buyer may decline to treat the delivery to the carrier as a delivery to himself, or may hold the seller responsible in damages.

“(3) Unless otherwise agreed, where goods are sent by the seller to the buyer under circumstances in which the seller knows or ought to know that it is usual to insure, the seller must give such notice to the buyer as may enable him to insure them during their transit, and, if the seller fails to do so, the goods shall be deemed to be at his risk during such transit.”

Question 348: When is the seller liable as insurer of goods in transit?

Sec. 271. Right to Examine the Goods.

Case No. 349. Uniform Sales Act, Sec. 47.

(See page 596, *post.*)

Question 349: (1.) What is the right of examining the goods?

(2.) Must a carrier permit examination of the goods?

Case No. 350. Zipp Mfg. Co. v. Pastorino, 120 Wis. 176.

Facts: The facts appear in the opinion.

Point Involved: The buyer having the right to test the goods, what constitutes a reasonable test, and the consequence of his making an unreasonable test.

WINSLOW, J.: “This is an action to recover the purchase price of a barrel of vanilla sold by the plaintiff to the defendants, who were wholesale manufacturers of candy, under an agreement that if, upon fair test, it did not prove satisfactory it might be returned. The defense was that the vanilla was of poor quality and proved unsatisfactory upon a test being made, and was returned. A verdict for the plaintiff was directed on the ground that the evidence showed without dispute that the defendants

had accepted the vanilla by using in their business a far larger amount than was reasonably necessary for testing purposes. Examination of the evidence shows that the direction was plainly right. It appeared without dispute that a satisfactory test could be made by the use of a few ounces; also that the defendants used from four to six ounces daily in the manufacture of candy for a period of more than six weeks, during which time they made and sold about three tons of candy flavored with the vanilla, although by their own admissions they discovered that it was not satisfactory after making the first test. For testing purposes they could only use such quantity as was fairly and reasonably necessary to determine its quality. *Cream City G. Co. v. Friedlander*, 84 Wis. 53, 54 N. W. 28. When they went beyond this, as they unquestionably did in this case, they made it their own, and lost the right of rejection."

By the COURT: "Judgment affirmed."

Question 350: State the facts, the question presented and the Court's decision in this case.

Sec. 272. What Constitutes Acceptance.

Case No. 351. Uniform Sales Act, Sec. 48.

(See page 596, *post*.)

Question 351: In what three ways may a buyer indicate this acceptance of the goods?

(Note: Acceptance may precede, coincide with or follow *delivery*, for as we have seen, the buyer who orders by description has a reasonable time for inspection; acceptance is not necessarily coincident with *transfer of title*, for title may pass (as in deliveries to carriers) subject to a right of inspection.)

Case No. 352. *Cream City Glass Co. v. Friedlander*, 84 Wis. 53, 21 L. R. A. 135.

Facts: The Cream City Glass Co., manufacturers of glass, bought from Friedlander a quantity of soda ash.

The ash was delivered and the buyer on receiving it examined it and found it water-soaked and at once notified the seller that it was unfit for use, and that such soda ash was held subject to the seller's orders. About a month later, the ash being still uncalled for, the buyer used about three-fourths of a ton to test whether it could be used in making glass, and this test was unsatisfactory. The ash had been paid for on its arrival before it was known to be defective. This is a suit by the buyer for the recovery of the money so paid.

Point Involved: Whether use of the property by the buyer after his rejection, amounts to an acceptance by him. Whether a test after a rejection is a use of the property within the meaning of the rule.

WINSLOW, J.: “* * * Assuming that the evidence is sufficient to establish an implied warranty that the soda ash in question was of a quality reasonably fit to be used in the manufacture of glass, the question is, could the plaintiff, after having decided that the material was wholly unfit, and notified the defendant of its decision and its rejection of the material, proceed to use three-quarters of a ton of the material in making a practical test, and still insist on its right of rejection? * * * But this test is plainly for the purpose only of enabling the purchaser to decide whether the material conforms to the contract. If the fact can be determined by inspection alone, the test is not necessary, and the use of the material, therefore, clearly unjustifiable. Now, in this case the plaintiff's officers determined at once, and upon inspection alone, that the material was unfit for their purposes, and so notified the defendant, and rejected the entire lot. They did not claim to need any test. They took their position definitely. After that act they could not deal with the property in any way inconsistent with the rejection, if they proposed to insist upon their right to reject. *Churchill v. Price*, 44 Wis. 540. They must do no act which they would have no right to do unless they were owners of the goods. Benjamin, Sales, 6th ed., § 703. Under these rules

it is evident the plaintiff had no right to use up a quantity of the material several weeks after the rejection. By the rejection it became defendant's property, if such rejection was rightful. Plaintiff had no right to use any part of it. It is claimed that the use was simply for the purpose of providing evidence of unfitness for the purposes of the trial of this case; but one has no right to use his opponent's property for the purpose of making evidence. The act was an unmistakable act of ownership, and entirely inconsistent with the claim that the material had been rejected, and was owned by defendant. It follows that the judgment must be reversed."

Question 352: State the facts, the question presented and the Court's decision in this case.

(2.) A contracted with B to manufacture, sell and deliver to B and put in running order a certain machine. A set up the machine and put it in running order. B found it unsatisfactory and notified A that he rejected the machine. He continued to use it for three months, but continually complained of its defective condition. At the end of the three months he took it down and notified A to come and get it. Has B lost his right to reject the machine? (*Brown v. Foster*, 108 N. Y. 387.)

Sec. 273. Acceptance as Barring Action for Damages.

Case No. 353. Uniform Sales Act, Sec. 49.

(See page 596, *post.*)

Question 353: What does the Sales Act provide with respect to the effect of acceptance on the buyer's right to sue for damages?

Case No. 354. *Redlands Orange Growers Ass'n v. Gorman*, 161 Mo. 203.

Facts: Plaintiff sued for \$486.50 for oranges sold and delivered to defendant. The defense was that the goods arrived late whereby the buyers were damaged \$450, which sum they set up by way of counterclaim.

Point Involved: The right to sue for damages caused by tardy performance, where the buyer accepts the goods.

GANTT, J., delivered the opinion of the Court: “* * *
 The position of the appellants is that, when goods are delivered out of time, and the vendee accepts them without protest he thereby waives his right to damages resulting from the breach of the contract, except where the goods are accepted of necessity, that is, where the surrounding circumstances are such as to make it necessary for him to accept in order to avoid the accumulation of much greater damages. We cannot accede to this view of the law. We believe the law to be that, where time is made the essence of the contract, delay beyond the stipulated time in the shipment or delivery of goods does not preclude the vendee from accepting them. If he does so, and is damaged on account of the delay, and he has paid the purchase money, he may bring this action and recover his damage. If he has not so paid, he may recoup his damage when sued for the purchase price. * * *”

Question 354: If goods are delivered tardily by the seller and the buyer, having a right to reject, nevertheless, accepts, can the buyer claim damages?

(Note: For other cases on the effect of acceptance and rights on breach of warranty see Sec. 293, *post*.)

(In some states the rule is that accepting the goods with knowledge of the defect, or after a reasonable opportunity for inspection, waives all rights to damages. Under the Sales Act, such acceptance has this effect.

1st. It waives the right to afterwards reject the goods.

2nd. It does not as a matter of law waive the right to sue for damages.

3rd. It may as a matter of fact be evidence that the goods are accepted as a fulfilment of the contract, or that they do in fact fulfil the contract, especially if there is no notice given of the defect.

But some states [some of which have now adopted the Sales Act] have held that acceptance, after opportunity of reasonable inspection or knowledge of defect, bars not only the right to afterwards reject the goods but a right to sue for damages.)

Sec. 274. Buyer Not Bound to Return Goods Wrongly Delivered.

Case No. 355. Uniform Sales Act, Sec. 50.

“Unless otherwise agreed, when goods are delivered to the buyer, and he refuses to accept them, having the right so to do, he is not bound to return them to the seller, but it is sufficient if he notifies the seller that he refuses to accept them.”

Question 355: Is it the buyer's duty to redeliver goods wrongfully delivered?

Case No. 356. Rubin et al. v. Sturtevant et al., 80 Fed. 930.

Facts: Plaintiffs sue defendants for the agreed price of certain fur capes, ordered by sample. When the goods were sent, defendants declined to accept them and re-shipped them to plaintiffs who refused to receive them. Later, defendants caused the goods to be resold at auction.

Point Involved: Whether the buyer upon refusing to accept the goods as not in fulfilment of the contract, has the right upon failing to get the seller to retake them, to resell them on account of the seller.

WALLACE, CIRCUIT JUDGE: “* * * Where there is an express warranty upon an executory contract of sale, and the articles which are the subject of the contract are found, when delivery is tendered to the vendee, not to correspond to the warranty, two remedies are open to him: He may return the articles and rescind the contract, or he may accept them, and affirming the contract sue upon the warranty. * * *

“A rescission contemplates that both parties shall be placed in *statu quo*, and ordinarily the vendee of goods, who proposes to rescind the contract for their purchase must rescind in *toto*. * * *

“In the present case the defendants elected to rescind,

* * *; but by the refusal of the defendants to receive the returned goods, they found themselves in the custody of the goods at a distant city. It then became proper for them, if it was not obligatory, to take such measures as would be most expedient to save unnecessary loss to the plaintiffs. If they had stored them, they would have been entitled to recover the reasonable expenses. If it was more expedient to sell them, and if they exercised reasonable diligence in selling them, they only became responsible for the proceeds. * * *,”

Question 356: State the facts, the question presented and the Court's decision in this case.

Sec. 275. Buyer's Liability for Failing to Accept Delivery.

Case No. 357. Uniform Sales Act, Sec. 51.

(See page 597, *post.*)

Question 357: Where a buyer wrongfully refuses to take delivery, what is the seller's measure of damages?

PART XII

RIGHTS OF AN UNPAID SELLER AGAINST THE GOODS

Chapter forty-four.	In general. Remedies enumerated.
Chapter forty-five.	Unpaid seller's lien.
Chapter forty-six.	Stoppage <i>in transitu</i> .
Chapter forty-seven.	Resale and rescission by seller.

CHAPTER FORTY-FOUR

REMEDIES OF AN UNPAID SELLER

§ 276. Definition of unpaid seller.

§ 277. Remedies of unpaid seller enumerated.

Sec. 276. Definition of Unpaid Seller.

Case No. 358. Uniform Sales Act, Sec. 52.

(See page 597, *post*.)

Question 358: Define an "unpaid seller."

Sec. 277. Remedies of an Unpaid Seller.

Case No. 359. Uniform Sales Act, Sec. 53.

(See page 597, *post*.)

Question 359: Enumerate the remedies of an unpaid seller against the goods.

CHAPTER FORTY-FIVE

UNPAID SELLER'S LIEN

§ 278. When right of lien may be exercised. § 279. Lien after part delivery.
§ 280. Where lien is lost.

Sec. 278. When Right of Lien May Be Exercised.

Case No. 360. Uniform Sales Act, Sec. 54.
(See page 597, *post*.)

Question 360: Under what circumstances does the seller have a lien upon the goods sold?

Case No. 361. *Arnold v. Delano*, 4 Cush. (Mass.) 33.

Facts: Delano sold Lowerly 65 cords of wood, and the same was staked off and identified and Lowerly was to come and get it within a year, and he had a license to come on Delano's land for that purpose. Lowerly, before any of the wood had been taken went into bankruptcy and his assignee claimed the wood as against Delano, claiming that title had passed and that all Delano had was a general claim with other creditors against Lowerly's assets. But Delano claimed a *lien* on the wood for the purchase price.

Point Involved: Whether a seller has a lien on goods of the buyer in his possession sold on credit where the buyer becomes insolvent prior to his receipt of the goods.

SHAW, C. J., delivered the opinion of the Court:
“* * * when goods are sold and there is no stipulation for credit or time * * * the vendor has * * * a lien for the price; in other words he is not bound actu-

ally to part with the possession * * * without being paid for them. The term *lien* imports that by the contract of sale * * * the property has vested in the buyer, because no man can have a lien on his own goods. The very definition of a lien is a right to hold goods, the property of another, in security for some debt, duty or other obligation. * * * A lien for the price is incident to the contract of sale when there is no stipulation therein to the contrary. * * * But * * * when a *credit* is given by agreement the vendee has a right to the custody and actual possession on a promise to pay at a future time. He may then take the goods away and into his own actual possession; and, if he does so, the lien of the vendor is gone, it being a right incident to the possession.

“But the law, in holding that a vendor, who has thus given credit for the goods, waives his lien for the price, does so on one implied condition * * * that the vendee shall keep his credit good. If, therefore, before payment the vendee become bankrupt or insolvent and the vendor still retains the custody of the goods, or any part of them; or * * * then his lien is restored and he may hold the goods as security for the price.
* * *

Question 361: (1.) State the facts in the question presented and the court's decision in this case.

(2.) Does a seller from whom title has not passed have a lien? Why?

(3.) Define a lien.

Sec. 279. Lien After Part Delivery.

Case No. 362. Uniform Sales Act, Sec. 55.

(See page 598, *post*.)

Question 362: What does section 55 provide?

Sec. 280. When Lien is Lost.

Case No. 363. Uniform Sales Act, Sec. 56.

(See page 598, *post*.)

Question 363: How does an unpaid seller lose his lien?

CHAPTER FORTY-SIX

STOPPAGE IN TRANSITU

§ 281. Right of stoppage.

§ 283. Ways of exercising right.

§ 282. When goods are in transit.

Sec. 281. Right of Stoppage.

Case No. 364. Uniform Sales Act, Sec. 57.
(See page 598, *post*.)

Question 364: What is the right of stoppage *in transitu*?

Case No. 365. Farrell v. R. & D. R. R. Co., 100 N. C. 390.

Facts: Farrell sold to A and B, a safe, on credit, shipped over the R. & D. R. R. Co., from Philadelphia to Durham, N. C. During the shipment, Farrell learned that A and B were insolvent, and demanded of the railroad company a return of the safe, tendering freight and other charges. The railroad company refused to return the safe and claimed that before it had received the notice, it had itself attached the safe as the property of the consignee on a claim against such consignee, and it claimed ownership of the safe through such attachment proceedings. Farrell sued the railroad company.

Point Involved: The nature of the right of stoppage *in transitu*; whether it precedes liens against the goods of the buyer.

SHEPHERD, J., delivered the opinion of the Court:
“The plaintiffs’ action is based upon their alleged right to stop the property *in transitu*. This right ‘arises solely

upon the insolvency of the buyer, and is based on the plain reason of justice and equity that one man's goods shall not be applied to the payment of another man's debts. If, therefore, after the vendor has delivered the goods out of his own possession and put them in the hands of a carrier for delivery to the buyer (which * * * is such a constructive delivery as divests the vendor's lien) he discovers that the buyer is insolvent, he may retake the goods, if he can, before they reach the buyer's possession, and thus avoid having his property applied to paying debts due to the buyer by other people.' * * *

"The mere fact that (the buyers) were insolvent at the time of the sale could not defeat the lien of the plaintiffs unless they knew of such insolvency. * * *

"An attachment or execution against the vendee does no preclude the stoppage *in transitu*. * * *

"The vendor's right of stoppage *in transitu* is paramount to all liens against the purchasers."

Question 365: (1.) State the facts, the question presented and the Court's decision in this case.

(2.) What is the basis of the right of stoppage *in transitu*?

Sec. 282. When Goods Are in Transit.

Case No. 366. Uniform Sales Act, Sec. 58.

(See page 598, *post.*)

Question 366: State when the goods are to be considered in transit, when not in transit for the purpose of exercising the right of stoppage *in transitu*.

Case No. 367. *Re W. A. Paterson Co.*, 186 Fed. 629, 34 L. R. A. N. S. 31.

Facts: The Paterson Co. was a manufacturer of vehicles at Flint, Michigan. Manley was engaged in selling vehicles at St. Louis, Missouri. Elder & Wood, who were engaged in like business at Mammoth Springs, Arkansas, ordered a carload of vehicles from Manley, in September,

1908. Manley thereupon ordered these vehicles from the Paterson Company and directed it to ship to Elder & Wood at Mammoth Springs, Arkansas. Afterwards, on September 17, 1908, Manley directed the Paterson Company to ship these vehicles to him at St. Louis, Missouri. On October 3, 1908, the Paterson Company shipped the vehicles from Flint, Michigan, by rail to Manley at St. Louis. The company procured a bill of lading naming it as consignor and Manley as consignee. The Paterson Company sent the bill of lading to Manley, with the invoice of the goods indicating that the goods were sold to Manley for \$1,018.75. On the arrival of the vehicles at St. Louis, on October 7, 1908, Manley sent his clerk to the office of the St. Louis & San Francisco R. R. Co. at St. Louis, and he, by direction of Manley, surrendered the bill of lading to the railroad company, which issued, by direction of Manley, a bill of lading wherein Manley was named as consignor and Elder & Wood, Mammoth Springs, Arkansas, as consignees. Under this bill of lading, the goods were forwarded to Mammoth Springs, and Manley sent an invoice of the vehicles to Elder & Wood which indicated a sale from him to them for \$1,304.25. On October 10, 1908, Manley made a general assignment for benefit of creditors. On October 13, 1908, the Paterson Co. and other creditors of Manley filed an involuntary petition in bankruptcy against him, upon which he was subsequently adjudged a bankrupt. On the same day the Paterson Co. telegraphed from Flint, Michigan, to the agent of the St. L. & S. F. R. R. Co. at Detroit, Michigan, to hold the car of vehicles for it, and at some time after October 14, 1908, the railroad company returned the vehicles to that company. The Paterson Co. filed a claim against the bankrupt for \$17,017.45 for the purchase price of vehicles which it had sold to Manley prior to the transaction in question, and this claim was allowed. Thereafter a motion was made by the trustee to expunge this claim unless the Paterson Co. would pay back to the trustee the value of this carload of vehicles, which it obtained after the petition in bankruptcy was filed. This

motion was granted and the Paterson Company appeals.

Point Involved: When the transit ceases during which the right of stoppage may be exercised.

SANBORN, CIRCUIT JUDGE: “* * * [After reciting the facts above given.]

“But the right of stoppage *in transitu* ceases when the transit between the vendor and purchaser ends. The Paterson Company sold the vehicles to Manley. It sent to Manley the bill of lading, which named him as consignee, and thereby gave him dominion and control over the goods, and it invoiced them to him as the purchaser. It never sold the goods to Elder & Wood, and was not in any way in privity with them. Therefore, when Manley’s clerk, by his direction, surrendered the bill of lading to the St. Louis & San Francisco Railroad Company at St. Louis, the destination named in the bill, and reshipped and rebilled them to Manley’s purchaser, Elder & Wood, the transit between the Paterson Company and its vendee, Manley, ended and the right of stoppage *in transitu* ceased. *A. J. Neimeyer Lumber Co. v. Burlington & M. River R. Co.*, 54 Neb. 321, 341, 342, 40 L. R. A. 534, 74 N. W. 670; *Eaton v. Cook*, 32 Vt. 59, 61; *Rowley v. Bigelow*, 12 Pick. 307, 313, 314, 23 Am. Dec. 607; *Memphis & L. R. R. Co. v. Freed*, 38 Ark. 614, 622; *Treadwell v. Aydlett*, 9 Heisk. 388.”

Question 367: (1.) State this case.

(2.) A sells goods to B, and sends them by freight to C, a forwarder employed by B to send them on to a further point when so ordered by B. B becomes insolvent while the goods are in C’s possession. A attempts to exercise his right to stop. Are the goods still in transit? (*Biggs v. Barry*, Fed. Cas. 1402.)

Sec. 283. Ways of Exercising Right to Stop.

Case No. 368. Uniform Sales Act, Sec. 59.

(See page 599, *post.*)

Question 368: How may the seller exercise the right of stoppage *in transitu*?

CHAPTER FORTY-SEVEN

RESALE AND RESCISSION BY SELLER

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| § 284. When and how resale may be made. | § 286. Effect of sale of goods subject to lien of stoppage in transitu. |
| § 285. When and how the seller may rescind the sale. | |

Sec. 284. When and How Resale May Be Made.

Case No. 369. Uniform Sales Act, Sec. 60.

(See page 599, *post.*)

Question 369: State the provisions of Sec. 60 of the Sales Act.

Case No. 370. Bagley v. Findlay, 82 Ill. 524. (Set out as Case No. 374, *post.*)

Question 369: (See question 274.)

Sec. 285. When and How the Seller May Rescind the Sale.

Case No. 371. Uniform Sales Act, Sec. 61.

(See page 599, *post.*)

Question 371: State the provisions of Sec. 61, Sales Act.

Sec. 286. Effect of Sale of Goods Subject to Lien of Stoppage in Transitu.

Case No. 372. Uniform Sales Act, Sec. 62.

(See page 600, *post.*)

Question 372: State the provisions of this section.

PART XIII

ACTIONS FOR BREACH OF THE CONTRACT

Chapter Forty-eight. Remedies of the seller.

Chapter Forty-nine. Remedies of the buyer.

CHAPTER FORTY-EIGHT

REMEDIES OF THE SELLER

§ 287. Action for the price. § 289. When seller may rescind con-

§ 288. Action for damages for non- tract or sale.
 acceptance.

Sec. 287. Action for the Price.

Case No. 373. Uniform Sales Act, Sec. 63.

(See page 600, *post.*)

Question 373: State the provisions of Sec. 63 of the Sales Act.

Case No. 374. Bagley v. Findlay, 82 Ill. 524.

Facts: Suit by Findlay, as seller, against Bagley, as buyer, of certain goods for damages for refusing to receive the goods, the seller having tendered delivery to the buyer. Part of the goods were in Milwaukee and part in Chicago. After the buyer refused to accept the goods, the seller gave notice that he would proceed to resell them and held the buyer responsible for the loss. The net proceeds of the resale fell short of the contract price by \$1,-629.86, not including \$402.62 expenses for commissions

and charges. Judgment was entered for \$1,629.86 and defendant appeals.

Point Involved: The remedies of the seller where the buyer refuses to take the goods.

MR. JUSTICE DICKEY delivered the opinion of the Court: "When a vendee of goods, sold at a specific price, refuses to take and pay for the goods, the vendor may store the goods for the vendee, give him notice that he has done so, and then recover the full contract price, or he may keep the goods and recover the excess of the contract price over and above the market price of the goods at the time and place of delivery, and this means the market price of such goods in such condition and in such quantity as the goods were at the time for delivery. In such case, if goods are bought in large quantities, the market price at retail is not the standard, but the market price in large quantities; or the vendor may, giving notice to the vendee, proceed to sell the goods, in their then condition and quantity, to the best advantage, and recover of the vendee the loss, if the goods fail to bring the amount of the contract price. The appellee adopted the latter course, and the only question of fact presented is, were the goods sold to the best advantage?

"In such case, the vendor takes the position of agent for the vendee, and is held to the same degree of care, judgment and fidelity that is imposed by the law upon an agent put in the custody of such goods in such condition, with instructions to sell them to the best advantage.

"Without reviewing the evidence in this case, it is sufficient for us to say that the evidence fully sustains the finding of the Court—that the goods were fairly sold, with reasonable diligence, judgment and care.

"Appellant insists that the sale must, in such case, be in the market where the goods are, and objects that the goods stored in Milwaukee were sold in Chicago. The purchaser was found in Chicago, but he bought the goods in their then condition in store in Milwaukee, and if these goods were taken to Chicago at all, it was after the sale.

“The appellant has no just cause of complaint against the finding of the Court. Upon the evidence shown in the record, the Court below might, without impropriety, have included in the assessment of damages the \$402 expenses incurred by the appellee for commissions and charges incurred in making the sale.

“Judgment affirmed.”

Question 374: Where the vendee refuses to receive the goods, what are the remedies of the vendor?

Sec. 288. Action for Damages for Non-Acceptance of Goods.

Case No. 375. Uniform Sales Act, Sec. 64.
(See page 600, *post.*)

Question 375: State the provisions of this section.

Sec. 289. When Seller May Rescind Contract or Sale.

Case No. 376. Uniform Sales Act, Sec. 65.
(See page 601, *post.*)

Question 376: When may the seller rescind the contract of sale?

CHAPTER FORTY-NINE

REMEDIES OF THE BUYER

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| § 290. Action for converting or detaining goods. | § 292. Specific performance. |
| § 291. Action for failing to deliver goods. | § 293. Remedies for breach of warranty. |
| | § 294. Interest and special damages. |

Sec. 290. Action for Converting or Detaining Goods.

Case No. 377. Uniform Sales Act, Sec. 66.

(See page 601, *post.*)

Question 377: What are the provisions of this section?

Sec. 291. Action for Failing to Deliver Goods.

Case No. 378. Uniform Sales Act, Sec. 67.

(See page 601, *post.*)

Question 378: What are the provisions of this section?

Case No. 379. *Jordan v. Patterson*, 67 Conn. 473.

(Set out on page 153, *supra.*)

Sec. 292. Specific Performance.

Case No. 380. Uniform Sales Act, Sec. 68.

(See page 601, *post.*)

Question 380: What are the provisions of this section?

Case No. 381. *P. & F. Corbin v. Tracy*, 34 Conn. 325.

(Set out as Case No. 155, *supra.*)

Sec. 293. Remedies for Breach of Warranty.

Case No. 382. Uniform Sales Act, Sec. 69.
(See page 601, *post.*)

Question 382: State the provisions of Sec. 69, Sales Act.

Case No. 383. Underwood v. Wolf, 131 Ill. 425.

Facts: Sale by Wolf to Underwood of certain machinery, to be erected on Underwood's premises, and to meet certain requirements according to test. Suit to recover the contract price of such machines. Defendant claims a set-off by way of damages. Contention by the plaintiff that by not rejecting the goods, defendant waived his right to damages.

Point Involved: Whether the buyer may receive the goods and sue on the breach of warranty.

MR. JUSTICE MAGRUDER delivered the opinion of the Court: “* * * Where there is a sale and delivery of personal property *in presenti* with *express* warranty, and the property turns out to be defective, the vendee may receive and use the property and sue for damages on a breach of warranty, or, when sued for the purchase price, he may recoup such damages under the general issue or set them up in a specified plea of set-off. This is a well-settled rule. In the present case the contract is executory; the title to the property did not vest in the purchaser until the period for making the test had passed. It has been held in some states that, where the contract is thus executory and a time is fixed for making a test, the acceptance and use of the property, after such time has passed, amount to a waiver of the right to claim damages for a breach of the warranty. But such is not the law in this state. In the present case, the evidence tends to show that the defendants took possession about July 1, 1886, of the machines placed in their packing house by the plaintiff, and had been using the same up to the time of the trial of the cause in the Court below. * * *

"We think that even where the contract is executory, the claim for damages on account of a breach of the warranty will survive the acceptance of the property.

* * * In *Babcock v. Trice*, 18 Ill. 420, there was an executory contract for the sale and delivery of corn with an implied warranty that it should be of a fair and merchantable quality; it was there said: 'It is true that the acceptance of corn under an executory contract, with opportunity of inspection at the time of delivery, without complaint, may raise a presumption that it was of the quality contemplated by the parties, but it will not preclude the party from showing and setting up the actual defect in quality and condition. * * * He could * * * under the general issue prove the facts out of which the warranty arose, the breach and his damages by way of recoupment. * * *'

Question 383: Can a purchaser, according to this case, accept the goods, knowing that they are not as warranted and then claim damages for the breach of warranty?

Case No. 384. *North Alaska Salmon Co. v. Hobbs, Wall & Co.*, 159 Cal. 380, 35 L. R. A., new series, 501.

Facts: The facts are stated in the opinion.

Point Involved: The right of a buyer of personal property upon an express warranty to sue for breach of such warranty where he has accepted the goods with knowledge of the breach.

SHAW, J., delivered the opinion of the court:

"This is an appeal from an order denying the defendant's motion for a new trial.

"The action was brought to recover damages for the breach of an express warranty in the sale of goods. The plaintiff alleged that in November, 1903, plaintiff and defendant agreed in writing that the defendant should manufacture, sell, and deliver to plaintiff at the premises of the American Can Company, in San Francisco, 120,000 salmon boxes, the defendant thereby expressly warrant-

ing that all said boxes should be of dry stock and free from dampness, and further agreeing to deliver the same between December, 1903, and April 10, 1904; that defendant at the time knew that plaintiff required for its business in salmon canning a large quantity of empty cans packed in dry boxes for shipment to the canneries of plaintiff on Bristol bay, by vessels to leave San Francisco on April 15th, 1904, so as to reach the canneries at the opening of the fishing season of that year, which would end about August 1st; that defendant delivered 93,000 boxes under the contract, from January 5, to March 3, 1904, at the premises of the American Can Company, for which plaintiff paid the contract price on delivery. It is further averred that a large number of boxes were not of dry stock nor free from dampness, and because thereof the cans packed therein became rusty and unfit for use, whereby the plaintiff was damaged in the sum of \$15,000. The cause was tried by a jury, a verdict was rendered in favor of the plaintiff for \$3,500, and judgment was given accordingly.

“The evidence showed the making of the contract, as alleged, that the plaintiff about the same time had engaged the American Can Company to make a large number of cans to be packed in said boxes, and directed the defendant to deliver the boxes to said can company for that purpose; that the defendant knew that the can company was to pack the boxes with the cans for the plaintiff's use during the fishing season of 1904, and that it was a matter of common knowledge that the plaintiff would not be able to procure dry salmon boxes from other dealers or factories in time for the fishing season, if the defendant failed to deliver the boxes, or if the boxes delivered were wet or damp. Plaintiff also proved the delivery of 93,000 of the boxes and payment therefor at the contract price. As the deliveries were made, the boxes were inspected by plaintiff. At the beginning of the delivery a number of the boxes were found to be not of dry stock nor free from dampness, and the defendant was immediately notified thereof, and promised that no

more of that quality should be delivered. Nevertheless, a large number of the boxes subsequently delivered were not of the quality warranted. They were all, however, inspected by the plaintiff's servants, and were taken and used by the plaintiff as cases, within which the cans were packed and shipped to Bristol bay. The dampness of the boxes caused a large number of the cans to become rusty and unfit for use, whereby plaintiff suffered damages to the amount given by the verdict.

"The defendant asked the Court to instruct the jury that, if the boxes delivered to plaintiff were damp at the time of delivery, and that fact was visible and apparent upon inspection, and the plaintiff was aware of the said condition of the boxes, but nevertheless accepted them and appropriated them to its own use without notifying the defendant at the time of receiving them, or within a reasonable time thereafter, that they were not accepted as fulfilling the contract, that the plaintiff thereby waived any such defects, and could not recover damages on account of them. This instruction was refused, and the Court instructed the jury that acceptance by the plaintiff and payment of the purchase price did not relieve the defendant from liability under its guaranty, and that, if they should find that the boxes were wet and damp at the time of delivery, and were accepted and paid for by the plaintiff, they should render a verdict for such damages as the evidence should show were caused by the wet and damp condition of the boxes. The defendant contends that the Court erred in refusing to give the instruction asked by it, and in instructing the jury as above stated.

"The main question in the case, and the one which controls the decision upon the merits, involves the right of a buyer of personal property upon an express warranty of quality to recover damages for a breach of such warranty, where he has accepted the goods with knowledge of the defect in quality. The defendant contends that the only remedy of the buyer in the case of an executory contract for the sale of goods with a warranty of quality, where he obtains knowledge of a defect in the quality at

the time the goods are offered for delivery, is to reject such goods and insist upon the due performance of the contract; or, if the discovery of the defective quality is made after delivery, to immediately rescind the contract and return, or offer to return, the goods received, and sue for the money paid therefor. The general rule applicable to all cases of sales of property is that the buyer has an election of remedies for a breach of a contract of warranty. If he knows of the defect at the time performance is offered, he may refuse to accept the goods, insist on due performance and sue for damages for nonperformance, if further performance is not duly offered, and if he has paid for the goods in advance, he can recover the amount of money paid thereon as part of the damages. If part performance has been made, he may rescind the contract, restore what he has received, and recover what he has paid. He need not rescind, or reject the goods, however, but may stand upon the contract, and, relying upon the warranty, may take the goods offered and sue for the damages caused by the breach.

“* * *

“The defendant contends that there is a well-recognized exception to this rule in cases where the defects in the articles are obvious, or where the buyer knows of them at the time of the acceptance of the goods. * * * If one who buys goods upon an express warranty of quality must refuse to receive them if he knows they are defective at the time, and waives his right of action on the warranty if he accepts them, the warranty would be useless, since he would have the same right if he had not taken the warranty, and his damage for nondelivery of the goods would be practically the same in one case as in the other, except in the one case where greater damages are allowed by the Code. Civil Code, Sec. 3314.

“For these reasons we are of the opinion that the Court correctly instructed the jury, and that the evidence sufficiently sustains the verdict of the jury.”

Question 384: What were the main facts, the defendant's contention and what the court held?

Case No. 385. Rogers v. Hanson, 35 Iowa, 283.

Facts: Sale of a machine, under express warranty, for which the purchasers gave a mare valued at \$100 and their notes for \$610. Warranty broken and judgment rescinding the contract, and requiring a surrender of the mare and notes. Appeal by seller.

Point Involved: Whether after receipt of the goods under a warranty, the purchaser may, on breach of the warranty, rescind the sale.

DAY, J.: "IV. Next it is urged that the Court erred in rendering a judgment rescinding the contract, and requiring a surrender of the mare and notes. The authorities are irreconcilably in conflict as to the right of a purchaser with warranty, upon a breach of the warranty to rescind the contract and recover the purchase price. As a result of the authorities Parsons states that the purchaser 'may return the goods forthwith, and if he does so without unreasonable delay, this will be a rescission of the sale, and he may sue for the price if he has paid it, or defend against an action for the price, if one be brought by the seller.' L. Parsons on Cont. (5th ed.), 592. At the same time he concedes that 'some authorities of great weight limit his right to return the goods for breach of warranty to cases of fraud, or where there was an express agreement to that effect between the parties.' Id. 593. Upon the other hand, in Story on the Law of Sales, it is stated that 'if the contract be executed, and the goods be completely accepted, so as to pass the property therein to the vendee, it is very generally held that he cannot elect to rescind the contract, and return the goods, after actually receiving them, so as to entitle him to bring an action for money had and received; but he must declare specially on his warranty.' Story on Sales (4th ed.), Sec. 421. But it is admitted that in some states it is held otherwise. In Don v. Fisher, 1 Cush. 271, Shaw, C. J., said: 'It' (a warranty) 'is not strictly a condition, for it neither suspends nor defeats the completion of the sale, the vesting of the thing sold in the vendee, nor the

right to the purchase money in the vendor. And notwithstanding such a warranty or any breach of it, the vendee may hold the goods, and have a remedy for his damages by action. But to avoid circuitry of action a warranty may be treated as a condition subsequent, at the election of the vendee, who may, upon a breach thereof, rescind the contract, and recover back the amount of his purchase money, as in case of fraud.'

"Such is also the rule in Maryland. See *Hyatt v. Boyle*, 5 Gill & Johns. 121; *Franklin v. Long*, 7 id. 407. The same rule has been declared in Maine. See *Marston v. Knight*, 29 Me. 341; see, also, *Bryant v. Isburgh*, 13 Gray, 607; *Kurtzman v. Weaver*, 20 Penn. St. 422; *Scranton v. Tilly*, 16 Tex. 183.

"The doctrine of the Massachusetts cases, though, perhaps, not sustained by the greater number of authorities, is, to our minds, the more reasonable and just. We know of no satisfactory reason why one who desires a good article and is willing to pay a price which will command it, should be required to keep an inferior article at a lesser price. Such a construction of the law substitutes for the party's contract an agreement which he did not make, and requires him to accept an article which he would not have purchased if he had known of its defects.

"The true rule, it seems to us, is to give the vendee his option to retain the purchased article and recover the damages sustained, or to restore it within a reasonable time, and recover the price paid."

Question 385: May one who has received goods under an express warranty, afterwards on discovering a breach thereof, return the goods or must he keep them and sue on the warranty? Are the authorities in harmony on this point?

Case No. 386. *Eichelroth v. Long*, 156 Ill. Ap. 108.

Facts: The facts are stated in the opinion.

Point Involved: Whether, if the contract provides that the goods purchased shall be returned within a certain time in case they are not in fulfillment of the warranty,

the buyer's remedies for breach of warranty are thereby limited.

MR. JUSTICE PUTERBAUGH: "Upon an appeal of this cause from a justice of the peace, appellee recovered judgment against appellant in the circuit court for \$138.16. The suit is based upon a note dated June 22, 1908, payable on or before September 1, 1908, to International Harvester Company of America, for the sum of \$130 with six per cent interest and signed by appellant. The note was given in payment for a binder sold to appellant by appellee, who was the agent of the Harvester Company, in April, 1908. The order for the binder contains the following warranty:

" 'International Harvester Company of America (incorporated) warrants the above machine to do good work, to be well made of good materials, and durable if used with proper care. If, upon one day's trial with proper care, the machine fails to work well, the purchaser shall immediately give written notice to International Harvester Company of America at 7 Monroe Street, Chicago, Illinois, and to the agent above named, stating wherein the machine fails, shall allow reasonable time for a competent man to be sent to put it in good order and render necessary and friendly assistance to operate it. If the machine cannot be made to work well, the purchaser shall immediately return it to said agent and the price shall be refunded which shall constitute a settlement in full of the transaction. Use of the machine after one day (or harvesting more than twelve acres), or failure to give written notice to said Company and its agent, or failure to return the machine, as above specified, shall operate as an acceptance of the machine and fulfillment of this warranty. No agent has power to change the contract of warranty in any respect, and the above order can be canceled only by said Company's Chicago office. This express warranty excludes all implied warranties, and said Company shall in no event be liable for breach of war-

ranty in an amount exceeding the purchase price of the machine.

(Signed) “ ‘P. M. LONG.

“ ‘Dated the 22nd day of April, 1908.

“ ‘Sold by E. O. Eichelroth.’

“The evidence shows that appellee, who was the agent of the International Harvester Company at Litchfield, Illinois, procured the order and note in question; that said note was afterward transferred by endorsement to appellee; that the binder was delivered to the son of appellant and that he began to cut wheat with it about noon on the same day; that the machine failed to operate properly; that upon the first or second day after its delivery, the trip hammer broke, whereupon appellant notified appellee and requested him to call and examine and repair the machine; that a few days later he called upon appellant at his office in Litchfield, and complained that the machine did not do good work, and that appellee promised to send a man to repair the machine, and told appellant to go ahead and use it in the meantime; that appellant continued to use the machine through the harvest after which time appellee sent an agent out, who attempted to adjust the same so that it would work satisfactorily; that appellant claimed the machine failed to do the work according to the warranty and offered to return it to appellee, but that appellee refused to accept the same and brought this suit.

“At the close of all the evidence the Court instructed the jury to return a verdict for the plaintiff for the amount of the note and interest.

“We do not think it necessary to determine whether or not the claim of appellant that the machine failed to do good work as warranted, is established by the evidence, for the reason that upon the alleged failure of the machine to work well after one day's trial, appellant failed to comply with the terms of the contract by immediately giving notice of such fact to either the Harvester Company or to appellee, or by returning the machine to appellee as agent

within a reasonable time. The evidence shows that no notice of any character was given to the Harvester Company, and it does not appear that such Company was ever advised of appellant's complaint that the machine failed to work. The evidence further discloses that instead of returning the machine to appellee upon discovering its alleged defects, appellant kept and used it the entire season, cutting in all about 100 acres of grain.

"It is well settled where one seeks to enforce a warranty imposing mutual and dependent obligations and covenants, he who seeks to enforce it must show compliance on his part before he can insist upon performance by his adversary. The clauses in the warranty relative to notice and return are material and substantial parts of it, and are for the protection of the seller, and the purchaser is no more at liberty to disregard them than he is any other clause of his contract. When appellant made this contract he agreed that he would satisfy himself within one day whether the binder worked to his satisfaction and filled the warranty, and further that if it did not, he would at once give the notice required by the contract, and that if he failed to give such notice, such failure should operate as an acceptance of the machinery and fulfillment of the warranty. The provisions in the contract are plain, and need no construction. * * *

Question 386: State the defense in this case and how it was disposed of.

(Note: Some courts make a distinction between general and limited warranties in this class of cases. Thus a promise that the machine is of a certain kind of material and that it must be returned in case it does not work well upon a test being made contains (as said in these cases) two warranties, upon the breach of one of which the goods must be returned, but for the breach of the other (defective material) there may be a suit for damages. Thus, *McCormick Harvesting Co. v. Fields*, 90 Minn. 161.)

Case No. 387. *McCormick v. Dunville*, 36 Ia. 645.

Facts: Sale of a machine, warranty that it will operate in a certain manner, and if it does not, seller will take it

back and refund money. Suit to recover price of the machine. Cross-claim by defendant on breach of warranty.

Point Involved: Whether, in case of a warranty with right to return if the warranty is broken, the buyer may keep the article and sue for damages from breach of warranty.

DAY, J.: “* * * Plaintiff, through his agent, agreed to take the machine back if it did not work as warranted; but it does not seem that it was made a condition of the defendant’s right of recovery for a breach of the warranty, that he should return or offer to return the machine. In this respect the warranty differs from that contained in Bomberger, Wright & Co. v. Greiner, 18 Iowa, 477, in which there was an express agreement that the machine should be returned if it failed to work as warranted. * * *”

Question 387: How does this case differ from the foregoing case?

Case No. 388. Sanford v. Brown Bros. Co., 208 N. Y. 90, 50 L. R. A. N. S. 778.

Facts: Suit brought to recover damages for breach of a warranty in sale of fruit trees. The defendant is a corporation engaged in the nursery business. Plaintiff is a farmer. He had never had any experience in the growing of peaches. He decided to plant 25 acres of land in peach trees and bought the trees from defendant under a contract by which it was provided that if any of the trees did not prove to be true to name, they were to be replaced free. This took place in 1902. In 1905, “concededly as early a date as discovery could be made,” 2,700 of the trees were found to be of a different variety than those ordered. Plaintiff sues for damages. Defendant contends that the plaintiff’s exclusive remedy is to have the trees replaced. It is conceded that there was no fraud on the part of the seller.

Point Involved: That a contract providing a remedy of the nature stated will be construed according to the evident intention of the parties as shown by all the surrounding facts and circumstances.

HOGAN J.: "It is alleged by counsel for appellant that the language used in the contract, 'any stock which does not prove to be true to name as labeled is to be replaced free, or purchase price refunded,' should be construed as a limited liability on the part of the defendant for any damage resulting under the contract. In support of the reasonableness of such construction stress was laid upon the absence of fraud or misrepresentation in the sale; that in view of the price, the trees, which were two years old, substantially all budded, were sold, 8½ cents each, out of which defendant paid the expense of boxing, freight, and agent's commissions, no nursery would or could have sold trees at such a price and assume risk greater than that specified in the contract, especially when such dealer had no more means of knowing that the variety of peaches were as labeled than that possessed by the purchaser.

"The form of contract was furnished by the defendant, and under well-established principles, any doubt as to the meaning of the terms employed must be resolved in favor of the plaintiff. The defendant was engaged in the nursery business, for how long a time does not appear, except by implication. Mr. Brown, the president of defendant, testified that he had been in the nursery business twenty-five or twenty-six years, and we may assume that the defendant corporation succeeded, in whole or in part, to his business. The plaintiff was a farmer without previous experience in the culture of peaches; he could not discover for a period of three or four years the variety of peaches, if any, the trees would bear. When he purchased the trees, he was justified in relying upon the superior knowledge of the defendant as to the quality of the trees to be selected and furnished by defendant. The defendant was chargeable with notice of the purpose

for which the trees were to be used, and also had knowledge that the trees would not attain to the bearing point for a period of three or four years, during which time plaintiff would be required to devote his time, together with labor and expense, to the cultivation of the orchard. It would be unreasonable to hold, under the terms of this contract, that at the end of three years, should the trees prove valueless, the only obligation was to furnish a supply of new trees, or refund the purchase price. In such a case, while defendant would sustain a loss to the extent of the original cost of the trees, the loss to plaintiff in the use of land, expenses of cultivation, etc., might prove very substantial.

“The judgment should be affirmed, with costs.”

Question 388: (1.) State the facts in this case, the question presented and the Court's decision.

Sec. 294. Interest and Special Damages.

Case No. 389. Uniform Sales Act, Sec. 70.

(See page 602, *post.*)

APPENDIX TO DIVISION C

UNIFORM SALES ACT

PART I.

FORMATION OF THE CONTRACT.

Section 1. (Contracts to Sell and Sales.) (1) A contract to sell goods is a contract whereby the seller agrees to transfer the property in goods to the buyer for a consideration called the price.

(2) A sale of goods is an agreement whereby the seller transfers the property in goods to the buyer for a consideration called the price.

(3) A contract to sell or a sale may be absolute or conditional.

(4) There may be a contract to sell or a sale between one part owner and another.

Section 2. (Capacity—Liabilities for Necessaries.) Capacity to buy and sell is regulated by the general law concerning capacity to contract, and to transfer and acquire property.

Where necessities are sold and delivered to an infant, or to a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price therefor.

Necessaries in this section means goods suitable to the condition in life of such infant or other person, and to his actual requirements at the time of delivery.

Section 3. (Form of Contract or Sale.) Subject to the provisions of this act and of any statute in that behalf, a contract to sell or a sale may be made in writing (either with or without seal), or by word of mouth, or partly in writing and partly by word of mouth, or may be inferred from the conduct of the parties.

Section 4. (Statute of Frauds.) (1) A contract to sell or a sale of any goods or choses in action of the value of five hundred dollars or upward shall not be enforceable by action unless the buyer shall accept part of the goods or choses in action so contracted to be sold or sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract or sale be signed by the party to be charged or his agent in that behalf.

(2) The provisions of this section apply to every such contract or sale, notwithstanding that the goods may be intended to be delivered at some future time or may not at the time of such contract or sale be actually made,

procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery; but if the goods are to be manufactured by the seller especially for the buyer and are not suitable for sale to others in the ordinary course of the seller's business, the provisions of this section shall not apply.

(3) There is an acceptance of goods within the meaning of this section when the buyer, either before or after delivery of the goods, expresses by words or conduct his assent to becoming the owner of those specific goods.

Section 5. (Existing and Future Goods.) (1) The goods which form the subject of a contract to sell may be either existing goods, owned or possessed by the seller, or goods to be manufactured or acquired by the seller after the making of the contract to sell, in this act called "future goods."

(2) There may be a contract to sell goods, the acquisition of which by the seller depends upon a contingency which may or may not happen.

(3) Where the parties purport to effect a present sale of future goods, the agreement operates as a contract to sell the goods.

Section 6. (Undivided Shares.) (1) There may be a contract to sell or a sale of an undivided share of goods. If the parties intend to effect a present sale, the buyer, by force of the agreement, becomes an owner in common with the owner or owners of the remaining shares.

(2) In the case of fungible goods, there may be a sale of an undivided share of specific mass, though the seller purports to sell and the buyer to buy a definite number, weight or measure of the goods in the mass, and though the number, weight or measure of the goods in the mass is undetermined. By such a sale the buyer becomes owner in common of such a share or the mass as the number, weight or measure bought bears to the number, weight or measure of the mass. If the mass contains less than the number, weight or measure bought, the buyer becomes the owner of the whole mass and the seller is bound to make good the deficiency from similar goods unless a contrary intent appears.

Section 7. (Destruction of Goods Sold.) (1) Where the parties purport to sell specific goods, and the goods without the knowledge of the seller have wholly perished at the time when the agreement is made, the agreement is void.

(2) Where the parties purport to sell specific goods, and the goods without the knowledge of the seller have perished in part or have wholly or in a material part so deteriorated, in quality as to be substantially changed in character, the buyer may at his option treat the sale—

(a) As avoided, or

(b) As transferring the property in all of the existing goods or in so much thereof as have not deteriorated, and as binding the buyer to pay the full agreed price if the sale was indivisible or to pay the agreed price for the goods in which the property passes if the sale was divisible.

Section 8. (Destruction of Goods Contracted to be Sold.) (1) Where there is a contract to sell specific goods, and subsequently but before the risk passes to the buyer, without any fault on the part of the seller or the buyer, the goods wholly perish, the contract is thereby avoided.

(2) Where there is a contract to sell specific goods, and subsequently, but before the risk passes to the buyer, without any fault of the seller or the buyer, part of the goods perish or the whole or a material part of the goods

so deteriorate in quality as to be substantially changed in character, the buyer may at his option treat the contract—

(a) As avoided, or

(b) As binding the seller to transfer the property in all of the existing goods or in so much thereof as have not deteriorated, and as binding the buyer to pay the full agreed price if the contract was indivisible, or to pay the agreed price for so much of the goods as the seller, by the buyer's option, is bound to transfer if the contract was divisible.

Section 9. (Definition and Ascertainment of Price.) (1) The price may be fixed by the contract, or may be left to be fixed in such manner as may be agreed, or it may be determined by the course of dealing between the parties.

(2) The price may be made payable in any personal property.

(3) Where transferring or promising to transfer any interest in real estate constitutes the whole or part of the consideration for transferring or for promising to transfer the property in goods, this act shall not apply.

(4) Where the price is not determined in accordance with the foregoing provisions the buyer must pay a reasonable price. What is a reasonable price is a question of fact dependent on the circumstances of each particular case.

Section 10. (Sale at a Valuation.) (1) Where there is a contract to sell or a sale of goods at a price or on terms to be fixed by a third person, and such third person without fault of the seller or the buyer, cannot or does not fix the price or terms, the contract or the sale is thereby avoided; but if the goods or any part thereof have been delivered to and appropriated by the buyer he must pay a reasonable price therefor.

(2) Where such third person is prevented from fixing the price or terms by fault of the seller or the buyer, the party not in fault may have such remedies against the party in fault as are allowed by Parts IV and V of this act.

Section 11. (Effect of Conditions.) (1) Where the obligation of either party to a contract to sell or a sale is subject to any condition which is not performed, such party may refuse to proceed with the contract or sale or he may waive performance of the condition. If the other party has promised that the condition should happen or be performed, such first-mentioned party may also treat the non-performance of the condition as a breach of warranty.

(2) Where the property in the goods has not passed, the buyer may treat the fulfillment by the seller of his obligation to furnish goods as described and as warranted expressly or by implication in the contract to sell as a condition of the obligation of the buyer to perform his promise to accept and pay for the goods.

Section 12. (Definition of Express Warranty.) Any affirmation of fact or any promise by the seller relating to the goods in an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon. No affirmation of the value of the goods nor any statement purporting to be a statement of the seller's opinion only shall be construed as a warranty.

Section 13. (Implied Warranties of Title.) In a contract to sell or a sale, unless a contrary intention appears, there is—

(1) An implied warranty on the part of the seller that in case of a sale

he has a right to sell the goods, and that in case of a contract to sell he will have a right to sell the goods at the time when the property is to pass.

(2) An implied warranty that the buyer shall have and enjoy quiet possession of the goods as against any lawful claims existing at the time of the sale.

(3) An implied warranty that the goods shall be free at the time of the sale from any charge or incumbrance in favor of any third person, not declared or known to the buyer before or at the time when the contract or sale is made.

(4) This section shall not, however, be held to render liable a sheriff, auctioneer, mortgagee, or other persons professing to sell by virtue of authority in fact or law goods in which a third person has a legal or equitable interest.

Section 14. (Implied Warranty in Sale by Description.) Where there is a contract to sell or a sale of goods by description, there is an implied warranty that the goods shall correspond with the description and if the contract or sale be by sample, as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.

Section 15. (Implied Warranties of Quality.) Subject to the provisions of this act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract to sell or a sale, except as follows:

(1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose.

2. Where the goods are bought by description from a seller who deals in goods of that description (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be of merchantable quality.

(3) If the buyer has examined the goods, there is no implied warranty as regards defects which such examination ought to have revealed.

(4) In the case of a contract to sell or a sale of a specified article under its patent or other trade name, there is no implied warranty as to its fitness for any particular purpose.

(5) An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade.

(6) An express warranty or condition does not negative a warranty or condition implied under this act unless inconsistent therewith.

Section 16. (Implied Warranties in Sale by Sample.) In the case of a contract to sell or a sale by sample:

(a) There is an implied warranty that the bulk shall correspond with the sample in quality.

(b) There is an implied warranty that the buyer shall have a reasonable opportunity of comparing the bulk with the sample, except so far as otherwise provided in section 47 (3).

(c) If the seller is a dealer in goods of that kind, there is an implied

warranty that the goods shall be free from any defect rendering them unmerchantable which would not be apparent on reasonable examination of the sample.

PART II.

TRANSFER OF PROPERTY AND TITLE.

Section 17. (No Property Passes until Goods are Ascertained.) Where there is a contract to sell unascertained goods no property in the goods is transferred to the buyer unless and until the goods are ascertained, but property in an undivided share of ascertained goods may be transferred as provided in section 6.

Section 18. (Property in Specific Goods Passes when Parties so Intend.) (1) Where there is a contract to sell specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

(2) For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties, usages of trade and the circumstances of the case.

Section 19. (Rules for Ascertaining Intention.) Unless a different intention appears, the following are rules for ascertaining the intention of the parties, as to the time at which the property in the goods is to pass to the buyer.

Rule 1. Where there is an unconditional contract to sell specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment, or the time of delivery, or both, be postponed.

Rule 2. Where there is a contract to sell specific goods and the seller is bound to do something to the goods, for the purpose of putting them into a deliverable state, the property does not pass until such thing be done.

Rule 3. (1) When the goods are delivered to the buyer "on sale or return," or on other terms indicating an intention to make a present sale, but to give the buyer an option to return the goods instead of paying the price, the property passes to the buyer on delivery, but he may revert the property in the seller by returning or tendering the goods within the time fixed in the contract, or, if no time has been fixed, within a reasonable time.

(2) When goods are delivered to the buyer on approval or on trial or on satisfaction, or other similar terms, the property therein passes to the buyer—

(a) When he signifies his approval or acceptance to the seller or does any other act adopting the transaction.

(b) If he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection, then if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time. What is a reasonable time is a question of fact.

Rule 4. (1) Where there is a contract to sell unascertained or future

goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be expressed or implied, and may be given either before or after the appropriation is made.

(2) Where, in pursuance of a contract to sell, the seller delivers the goods to the buyer, or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to or holding for the buyer, he is presumed to have unconditionally appropriated the goods to the contract, except in cases provided for in the next rule and in section 20. This presumption is applicable, although by the terms of the contract, the buyer is to pay the price before receiving delivery of the goods, and the goods are marked with the words "collect on delivery" or their equivalents.

Rule 5. If the contract to sell requires the seller to deliver the goods to the buyer, or at a particular place, or to pay the freight or cost of transportation to the buyer, or to a particular place, the property does not pass until the goods have been delivered to the buyer or reached the place agreed upon.

Section 20. (Reservation of Right of Possession or Property when Goods are Shipped.) (1) Where there is a contract to sell specific goods, or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of possession or property in the goods until certain conditions have been fulfilled. The right of possession or property may be thus reserved notwithstanding the delivery of the goods to the buyer or to a carrier or other bailee for the purpose of transmission to the buyer.

(2) Where goods are shipped, and by the bill of lading the goods are deliverable to the seller or his agent, or to the order of the seller or his agent, the seller thereby reserves the property in the goods. But if, except for the form of the bill of lading, the property would have passed to the buyer on shipment of the goods, the seller's property in the goods shall be deemed to be only for the purpose of securing performance by the buyer of his obligations under the contract.

(3) Where goods are shipped, and by the bill of lading the goods are deliverable to the order of the buyer or of his agent, but possession of the bill of lading is retained by the seller or his agent, the seller thereby reserves a right to the possession of the goods as against the buyer.

(4) Where the seller of goods draws on the buyer for the price and transmits the bill of exchange and bill of lading together to the buyer to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honor the bill of exchange, and if he wrongfully retains the bill of lading he acquires no added right thereby. If, however, the bill of lading provides that the goods are deliverable to the buyer or to the order of the buyer, or is indorsed in blank, or to the buyer by the consignee named therein, one who purchases in good faith, for value, the bill of lading, or goods from the buyer will obtain the property in the goods, although the bill of exchange has not been honored, provided that such purchaser has received delivery of the bill of lading

indorsed by the consignee named therein, or of the goods, without notice of the facts making the transfer wrongful.

Section 21. (Sale by Auction.) In the case of sale by auction—

(1) Where goods are put up for sale by auction in lots, each lot is the subject of a separate contract of sale.

(2) A sale by auction is complete when the auctioneer announces its completion by the fall of the hammer, or in other customary manner. Until such announcement is made, any bidder may retract his bid; and the auctioneer may withdraw the goods from sale unless the auction has been announced to be without reserve.

(3) A right to bid may be reserved expressly by or on behalf of the seller.

(4) Where notice has not been given that a sale by auction is subject to a right to bid on behalf of the seller, it shall not be lawful for the seller to bid himself or to employ or induce any person to bid at such sale on his behalf, or for the auctioneer to employ or induce any person to bid at such sale on behalf of the seller or knowingly take any bid from the seller or any person employed by him. Any sale contravening this rule may be treated as fraudulent by the buyer.

Section 22. (Risk of Loss.) Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer the goods are at the buyer's risk whether delivery has been made or not, except that—

(a) Where the delivery of the goods has been made to the buyer, or to a bailee for the buyer, in pursuance of the contract and the property in the goods has been retained by the seller merely to secure performance by the buyer of his obligation under the contract, the goods are at the buyer's risk from the time of such delivery.

(b) Where delivery has been delayed through the fault of either buyer or seller the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault.

Section 23. (Sale by a Person not the Owner.) (1) Subject to the provisions of this act, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell.

(2) Nothing in this act, however, shall affect—

(a) The provisions of any factors' acts, recording acts, or any enactment enabling the apparent owner of goods to dispose of them as if he were the true owner thereof.

(b) The validity of any contract to sell or sale under any special common law or statutory power of sale or under the order of a court of competent jurisdiction.

Section 24. (Sale by One Having a Voidable Title.) Where the seller of goods has a voidable title thereto, but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith, for value, and without notice of the seller's defect of title.

Section 25. (Sale by Seller in Possession of Goods Already Sold.) Where a person having sold goods continues in possession of the goods, or

of negotiable documents of title to the goods, the delivery or transfer by that person, or by an agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, to any person receiving and paying value for the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorized by the owner of the goods to make the same.

Section 26. (Creditors' Rights against Sold Goods in Seller's Possession.) Where a person having sold goods continues in possession of the goods, or of negotiable documents of title to the goods, and such retention of possession is fraudulent in fact or is deemed fraudulent under any rule of law, a creditor or creditors of the seller may treat the sale as void.

Section 27. (Definition of Negotiable Document of Title.) A document of title in which it is stated that the goods referred to therein will be delivered to the bearer, or to the order of any person named in such document, is a negotiable document of title.

Section 28. (Negotiation of Negotiable Documents by Delivery.) A negotiable document of title may be negotiated by delivery:

(a) Where by the terms of the document the carrier, warehouseman or other bailee issuing the same undertakes to deliver the goods to the bearer, or

(b) Where by the terms of the document the carrier, warehouseman or other bailee issuing the same undertakes to deliver the goods to the order of a specified person, and such person or a subsequent indorsee of the document has indorsed it in blank or to bearer.

Where by the terms of a negotiable document of title the goods are deliverable to a bearer or where a negotiable document of title has been indorsed in blank or to bearer, any holder may indorse the same to himself or to any other person, and in such case the document shall thereafter be negotiated only by the indorsement of such indorsee.

Section 29. (Negotiation of Negotiable Documents by Indorsement.) A negotiable document of title may be negotiated by the indorsement of the person to whose order the goods are by the terms of the document deliverable. Such indorsement may be in blank, to bearer or to a specified person. If indorsed to a specified person, it may be again negotiated by the indorsement of such person in blank, to bearer or to another specified person. Subsequent negotiation may be made in like manner.

Section 30. (Negotiable Documents of Title Marked "Not Negotiable.") If a document of title which contains an undertaking by a carrier, warehouseman or other bailee to deliver the goods to the bearer, to a specified person or order, or to the order of a specified person, or which contains words of like import, has placed upon it the words "Not negotiable," "non-negotiable" or the like, such a document may nevertheless be negotiated by the holder and is a negotiable document of title within the meaning of this act. But nothing in this act contained shall be construed as limiting or defining the effect upon the obligations of the carrier, warehouseman, or other bailee issuing a document of title of placing thereon the words "non-negotiable," or the like.

Section 31. (Transfer of Non-Negotiable Documents.) A document of title which is not in such form that it can be negotiated by delivery may be transferred by the holder by delivery to a purchaser or donee. A non-nego-

tiable document cannot be negotiated and the indorsement of such a document gives the transferee no additional right.

Section 32. (Who May Negotiate a Document.) A negotiable document of title may be negotiated:

(a) By the owner thereof, or

(b) By any person to whom the possession or custody of the document has been entrusted by the owner, if, by the terms of the document the bailee issuing the document undertakes to deliver the goods to the order of the person in whom the possession or custody of the document has been entrusted, or if at the time of such entrusting the document is in such form that it may be negotiated by delivery.

Section 33. (Rights of Person to Whom Document Has Been Negotiated.) A person to whom a negotiable document of title has been duly negotiated acquires thereby—

(a) Such title to the goods as the person negotiating the document to him had or had ability to convey to a purchaser in good faith for value and also such title to the goods as the person to whose order the goods were to be delivered by the terms of the document had or had ability to convey to a purchaser in good faith for value, and

(b) The direct obligation of the bailee, issuing the document to hold possession of the goods for him according to the terms of the document as fully as if such bailee had contracted directly with him.

Section 34. (Rights of Person to Whom Document Has Been Transferred.) A person to whom a document of title has been transferred, but not negotiated, acquires thereby, as against the transferor, the title to the goods, subject to the terms of any agreement with the transferor.

If the document is non-negotiable, such person also acquires the right to notify the bailee who issued the document of the transfer thereof, and thereby acquire the direct obligation of such bailee to hold possession of the goods for him according to the terms of the document.

Prior to the notification of such bailee by the transferor or transferee of a non-negotiable document of title the title of the transferee to the goods and the right to acquire the obligation of such bailee may be defeated by the levy of an attachment or execution upon the goods by a creditor of the transferor, or by a notification to such bailee by the transferor or a subsequent purchaser from the transferor of a subsequent sale of the goods by the transferor.

Section 35. (Transfer of Negotiable Document Without Indorsement.) Where a negotiable document of title is transferred for value by delivery, and the indorsement of the transferor is essential for negotiation, the transferee acquires a right against the transferor to compel him to indorse the document unless a contrary intention appears. The negotiation shall take effect as of the time when the indorsement is actually made.

Section 36. (Warranties on Sale of Document.) A person who for value negotiates or transfers a document of title by indorsement or delivery, including one who assigns for value a claim secured by a document of title unless a contrary intention appears, warrants:

(a) That the document is genuine.

(b) That he has a legal right to negotiate or transfer it.

(c) That he has knowledge of no fact which would impair the validity or worth of the document, and

(d) That he has a right to transfer the title to the goods, and that the goods are merchantable or fit for a particular purpose, whenever such warranties would have been implied if the contract of the parties had been to transfer without a document of title the goods represented thereby.

Section 37. (Indorser not a Guarantor.) The indorsement of a document of title shall not make the indorser liable for any failure on the part of the bailee who issued the document or previous indorsers thereof to fulfill their respective obligations.

Section 38. (When Negotiation not Impaired by Fraud, Mistake or Duress.) The validity of the negotiation of a negotiable document of title is not impaired by the fact that the negotiation was a breach of duty on the part of the person making the negotiation, or by the fact that the owner of the document was induced by fraud, mistake or duress to entrust the possession or custody thereof to such person, if the person to whom the document was negotiated or a person to whom the document was subsequently negotiated paid value therefor, without notice of the breach of duty, or fraud, mistake or duress.

Section 39. (Attachment or Levy upon Goods for which a Negotiable Document Has Been Issued.) If goods are delivered to a bailee by the owner or by a person whose act in conveying the title to them to a purchaser in good faith for value would bind the owner and a negotiable document of title is issued for them they cannot thereafter, while in the possession of such bailee, be attached by garnishment or otherwise or be levied upon under an execution unless the document be first surrendered to the bailee or its negotiation enjoined. The bailee shall in no case be compelled to deliver up the actual possession of the goods until the document is surrendered to him or impounded by the court.

Section 40. (Creditors' Remedies to Reach Negotiable Documents.) A creditor whose debtor is the owner of a negotiable document of title shall be entitled to such aid from courts of appropriate jurisdiction by injunction and otherwise in attaching such documents or in satisfying the claim by means thereof as is allowed at law or in equity in regard to property which cannot readily be attached or levied upon by ordinary process.

PART III.

PERFORMANCE OF THE CONTRACT.

Section 41. (Seller Must Deliver and Buyer Accept Goods.) It is the duty of the seller to deliver the goods, and of the buyer to accept and pay for them, in accordance with the terms of the contract to sell or sale.

Section 42. (Delivery and Payment are Concurrent Conditions.) Unless otherwise agreed, delivery of the goods and payment of the price are concurrent condition; that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price and the buyer must be ready and willing to pay the price in exchange for the possession of the goods.

Section 43. (Place, Time and Manner of Delivery.) (1) Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer is a question depending in each case on the contract,

express or implied, between the parties. Apart from any such contract, express or implied, or usage of trade to the contrary, the place of delivery is the seller's place of business if he have one, and if not, his residence, but in case of contract to sell or a sale of specific goods, which to the knowledge of the parties when the contract or the sale was made were in some other place, then that place is the place of delivery.

(2) Where by a contract to sell or a sale the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time.

(3) Where the goods at the time of sale are in the possession of a third person, the seller has not fulfilled his obligation to deliver to the buyer unless and until such third person acknowledges to the buyer that he holds the goods on the buyer's behalf; but as against all others than the seller the buyer shall be regarded as having received delivery from the time when such third person first has notice of the sale. Nothing in this section, however, shall affect the operation of the issue or transfer of any document of title to goods.

(4) Demand or tender of delivery may be treated as ineffectual unless made at a reasonable hour. What is a reasonable hour is a question of fact.

(5) Unless otherwise agreed, the expenses of and incidental to putting the goods into a deliverable state must be borne by the seller.

Section 44. (Delivery of Wrong Quantity.) (1) Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but if the buyer accepts or retains the goods so delivered, knowing that the seller is not going to perform the contract in full, he must pay for them at the contract rate. If, however, the buyer has used or disposed of the goods delivered before he knows that the seller is going to perform his contract in full, the buyer shall not be liable for more than the fair value to him of the goods so received.

(2) Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may accept the goods included in the contract and reject the rest, or he may reject the whole. If the buyer accepts the whole of the goods so delivered he must pay for them at the contract rate.

(3) Where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or he may reject the whole.

(4) The provisions of this section are subject to any usage of trade, special agreement, or course of dealing between the parties.

Section 45. (Delivery in Installments.) (1) Unless otherwise agreed, the buyer of the goods is not bound to accept delivery thereof by installments.

(2) Where there is a contract to sell goods to be delivered by stated installments, which are to be separately paid for, and the seller makes defective deliveries in respect of one or more installments, or the buyer neglects or refuses to take delivery of or pay for one or more installments, it depends in each case on the terms of the contract and the circumstances of the case whether the breach of contract is so material as to justify the injured party in refusing to proceed further and suing for damages for breach

of the entire contract, or whether the breach is severable, giving rise to a claim for compensation, but not to a right to treat the whole contract as broken.

Section 46. (Delivery to a Carrier on Behalf of the Buyer.) (1) Where, in pursuance of a contract to sell or a sale, the seller is authorized or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer is deemed to be a delivery of the goods to the buyer, except in cases provided for in section 19, rule 5, or unless a contrary intent appears.

(2) Unless otherwise authorized by the buyer, the seller must make such contract with the carrier on behalf of the buyer as may be reasonable, having regard to the nature of the goods and the other circumstances of the case. If the seller omit to so do, and the goods are lost or damaged in course of transit, the buyer may decline to treat the delivery to the carrier as a delivery to himself, or may hold the seller responsible in damages.

(3) Unless otherwise agreed, where goods are sent by the seller to the buyer under circumstances in which the seller knows or ought to know that it is usual to insure, the seller must give such notice to the buyer as may enable him to insure them during their transit, and, if the seller fails to do so, the goods shall be deemed to be at his risk during such transit.

Section 47. (Right to Examine the Goods.) (1) Where goods are delivered to the buyer, which he has not previously examined, he is not deemed to accept them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.

(2) Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract.

(3) Where goods are delivered to a carrier by the seller in accordance with the order from or agreement with the buyer, upon the terms that the goods shall not be delivered by the carrier to the buyer until he has paid the price, whether such terms are indicated by marking the goods with the words "collect on delivery," or otherwise, the buyer is not entitled to examine the goods before payment of the price in the absence of agreement permitting such examination.

Section 48. (What Constitutes Acceptance.) The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods intimating to the seller that he has rejected them.

Section 49. (Acceptance Does not Bar Action for Damages.) In the absence of express or implied agreement of the parties, acceptance of the goods by the buyer shall not discharge the seller from liability in damages or other legal remedy for breach of any promise or warranty in the contract to sell or the sale. But, if, after acceptance of the goods, the buyer fail to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows, or ought to know of such breach, the seller shall not be liable therefor.

Section 50. (Buyer is not Bound to Return Goods Wrongly Delivered.) Unless otherwise agreed, when goods are delivered to the buyer, and he refuses to accept them, having the right so to do, he is not bound to return them to the seller, but it is sufficient if he notifies the seller that he refuses to accept them.

Section 51. (Buyer's Liability for Failing to Accept Delivery.) When the seller is ready and willing to deliver the goods, and requests the buyer to take delivery, and the buyer does not within a reasonable time after such request take delivery of the goods, he is liable to the seller for any loss occasioned by his neglect or refusal to take delivery, and also for a reasonable charge for the care and custody of the goods. If the neglect or refusal of the buyer to take delivery amounts to a repudiation or breach of the entire contract, the seller shall have the rights against the goods and on the contract hereinafter provided in favor of the seller when the buyer is in default.

PART IV.

RIGHTS OF UNPAID SELLER AGAINST THE GOODS.

Section 52. (Definition of Unpaid Seller.) (1) The seller of goods is deemed to be an unpaid seller within the meaning of the act—

(a) When the whole of the price has not been paid or tendered.

(b) When a bill of exchange or other negotiable instrument has been received as conditional payment, and the condition on which it was received has been broken by reason of the dishonor of the instrument, the insolvency of the buyer, or otherwise.

(2) In this part of this act the term "seller" includes an agent of the seller to whom the bill of lading has been indorsed, or a consigner or agent who has himself paid, or is directly responsible for, the price, or any other person who is in the position of a seller.

Section 53. (Remedies of an Unpaid Seller.) (1) Subject to the provisions of this act, notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller of the goods, as such, has—

(a) A lien on the goods or right to retain them for the price while he is in possession of them;

(b) In case of the insolvency of the buyer, a right of stopping the goods in transitu after he has parted with the possession of them;

(c) A right of resale as limited by this act;

(d) A right to rescind the sale as limited by this act.

(2) Where the property in goods has not passed to the buyer, the unpaid seller has, in addition to his other remedies, a right of withholding delivery similar to and coextensive with his rights of lien and stoppage "in transitu" where the property has passed to the buyer.

Section 54. (When Right of Lien May be Exercised.) (1) Subject to the provisions of this act, the unpaid seller of goods who is in possession of them is entitled to retain possession of them until payment or tender of the price in the following cases, namely:

(a) Where the goods have been sold without any stipulation as to credit:

(b) Where the goods have been sold on credit, but the term of credit has expired;

(c) Where the buyer becomes insolvent.

(2) The seller may exercise his right of lien notwithstanding that he is in possession of the goods as agent or bailee for the buyer.

Section 55. (Lien after Part Delivery.) Where an unpaid seller has made part delivery of the goods, he may exercise his right of lien on the remainder, unless such part delivery has been made under such circumstances as to show an intent to waive the lien or right of retention.

Section 56. (When Lien is Lost.) (1) The unpaid seller of goods loses his lien thereon—

(a) When he delivers the goods to a carrier or other bailee for the purpose of transmission to the buyer without reserving the property in the goods or the right to the possession thereof;

(b) When the buyer or his agent lawfully obtains possession of the goods;

(c) By waiver thereof.

(2) The unpaid seller of goods, having a lien thereon, does not lose his lien by reason only that he has obtained judgment or decree for the price of the goods.

Section 57. (Seller may Stop Goods on Buyer's Insolvency.) Subject to the provisions of this act, when the buyer of goods is or becomes insolvent, the unpaid seller who has parted with the possession of the goods has the right of stopping them in transitu, that is to say, he may resume possession of the goods at any time while they are in transit, and he will then become entitled to the same rights in regard to the goods as he would have had if he had never parted with the possession.

Section 58. (When Goods are in Transit.) (1) Goods are in transit within the meaning of section 57—

(a) From the time when they are delivered to a carrier by land or water, or other bailee for the purpose of transmission to the buyer, until the buyer, or his agent in that behalf, takes delivery of them from such carrier or other bailee;

(b) If the goods are rejected by the buyer, and the carrier or other bailee continues in possession of them, even if the seller has refused to receive them back.

(2) Goods are no longer in transit within the meaning of section 57—

(a) If the buyer, or his agent in that behalf, obtains delivery of the goods before their arrival at the appointed destination;

(b) If, after the arrival of the goods at the appointed destination, the carrier or other bailee acknowledges to the buyer or his agent that he holds the goods on his behalf and continues in possession of them as bailee for the buyer or his agent; and it is immaterial that a further destination for the goods may have been indicated by the buyer;

(c) If the carrier or other bailee wrongfully refuses to deliver the goods to the buyer or his agent in that behalf.

(3) If the goods are delivered to a ship chartered by the buyer, it is a question depending on the circumstances of the particular case, whether they are in the possession of the master as a carrier or as agent of the buyer.

(4) If part delivery of the goods has been made to the buyer, or his

agent in that behalf, the remainder of the goods may be stopped in transitu, unless such part delivery has been made under such circumstances as to show an agreement with the buyer to give up possession of the whole of the goods.

Section 59. (Ways of Exercising the Right to Stop.) (1) The unpaid seller may exercise his right of stoppage in transitu either by obtaining actual possession of the goods or by giving notice of his claim to the carrier or other bailee in whose possession the goods are. Such notice may be given either to the person in actual possession of the goods or to his principal. In the latter case the notice to be effectual, must be given at such time and under such circumstances that the principal, by the exercise of reasonable diligence, may prevent a delivery to the buyer.

(2) When notice of stoppage in transitu is given by the seller to the carrier, or other bailee in possession of the goods, he must redeliver the goods to, or according to the directions of, the seller. The expenses of such redelivery must be borne by the seller. If, however, a negotiable document of title representing the goods has been issued by the carrier or other bailee, he shall not be obliged to deliver or be justified in delivering the goods to the seller unless such document is first surrendered for cancellation.

Section 60. (When and How Resale may be Made.) (1) Where the goods are of a perishable nature, or where the seller expressly reserves the right of resale in case the buyer should make default, or where the buyer has been in default in the payment of the price an unreasonable time, an unpaid seller having a right of lien or having stopped the goods in transitu may resell the goods. He shall not thereafter be liable to the original buyer upon the contract to sell or the sale or for any profit made by such resale, but may recover from the buyer damages for any loss occasioned by the breach of the contract or the sale.

(2) Where a resale is made, as authorized in this section, the buyer acquires a good title as against the original buyer.

(3) It is not essential to the validity of a resale that notice of an intention to resell the goods be given by the seller to the original buyer. But where the right to resell is not based on the perishable nature of the goods or upon an express provision of the contract or the sale, the giving or failure to give such notice shall be relevant in any issue involving the question whether the buyer had been in default an unreasonable time before the resale was made.

(4) It is not essential to the validity of a resale that notice of the time and place of such resale should be given by the seller to the original buyer.

(5) The seller is bound to exercise reasonable care and judgment in making a resale, and subject to this requirement may make a resale either by public or private sale.

Section 61. (When and How the Seller May Rescind the Sale.) (1) An unpaid seller having a right of lien or having stopped the goods in transitu, may rescind the transfer of title and resume the property in the goods, where he expressly reserved the right to do so in case the buyer should make default, or where the buyer has been in default in the payment of the price an unreasonable time. The seller shall not thereafter be liable to the buyer upon the contract to sell or the sale, but may recover from the buyer damages for any loss occasioned by the breach of the contract or the sale.

(2) The transfer of title shall not be held to have been rescinded by an unpaid seller until he has manifested by notice to the buyer or by some other overt act an intention to rescind. It is not necessary that such overt act should be communicated to the buyer, but the giving or failing to give notice to the buyer of the intention to rescind shall be relevant in any issue involving the question whether the buyer has been in default an unreasonable time before the right of rescission was asserted.

Section 62. (Effect of Sale of Goods Subject to Lien or Stoppage in Transitu.) Subject to the provisions of this act, the unpaid seller's right of lien or stoppage in transitu is not affected by any sale, or other disposition of the goods which the buyer may have made, unless the seller has assented thereto.

If, however, a negotiable document of title has been issued for goods, no seller's lien or right of stoppage in transitu shall defeat the right of any purchaser for value in good faith to whom such document has been negotiated, whether such negotiation be prior or subsequent to the notification to the carrier or other bailee who issued such document, of the seller's claim to a lien or right of stoppage in transitu.

PART V.

ACTIONS FOR BREACH OF THE CONTRACT.

Section 63. (Action for the Price.) (1) Where, under a contract to sell or a sale, the property of the goods has passed to the buyer, and the buyer neglects or refuses to pay for the goods according to the terms of the contract or the sale, the seller may maintain an action against him for the price of the goods.

(2) Where, under a contract to sell or a sale, the price is payable on a day certain, irrespective of delivery or of transfer of title and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property in the goods has not passed, and the goods have not been appropriated to the contract. But it shall be a defense to such an action that the seller at any time before judgment in such action has manifested an inability to perform the contract or the sale on his part or an intention not to perform it.

(3) Although the property in the goods has not passed, if they cannot readily be resold for a reasonable price, and if the provisions of section 64 (4) are not applicable, the seller may offer to deliver the goods to the buyer, and, if the buyer refuses to receive them, may notify the buyer that the goods are thereafter held by the seller as bailee for the buyer. Thereafter the seller may treat the goods as the buyer's and may maintain an action for the price.

Section 64. (Action for Damages for Non-Acceptance of the Goods.) (1) Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance.

(2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract.

(3) Where there is an available market for the goods in question, the measure of damages is, in the absence of special circumstances, showing proximate damage of a greater amount, the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or, if no time was fixed for acceptance, then at the time of the refusal to accept.

(4) If, while labor or expense of material amount are necessary on the part of the seller to enable him to fulfill his obligations under the contract to sell or the sale, the buyer repudiates the contract or the sale, or notifies the seller to proceed no further therewith, the buyer shall be liable to the seller for no greater damages than the seller would have suffered if he did nothing towards carrying out the contract or the sale after receiving notice of the buyer's repudiation or countermand. The profit the seller would have made if the contract or the sale had been fully performed shall be considered in estimating such damages.

Section 65. (When Seller May Rescind Contract or Sale.) Where the goods have not been delivered to the buyer, and the buyer has repudiated the contract to sell or sale, or has manifested his inability to perform his obligations thereunder, or has committed a material breach thereof, the seller may totally rescind the contract or the sale by giving notice of his election so to do to the buyer.

Section 66. (Action for Converting or Detaining Goods.) Where the property in the goods has passed to the buyer and the seller wrongfully neglects or refuses to deliver the goods, the buyer may maintain any action allowed by law to the owner of goods of similar kind when wrongfully converted or withheld.

Section 67. (Action for Failing to Deliver Goods.) (1) Where the property in the goods has not passed to the buyer, and the seller wrongfully neglects or refuses to deliver the goods, the buyer may maintain an action against the seller for damages for non-delivery.

(2) The measure of damages is the loss directly and naturally resulting in the ordinary course of events, from the seller's breach of contract.

(3) Where there is an available market for the goods in question, the measure of damages in the absence of special circumstances showing proximate damages of a greater amount, is the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver.

Section 68. (Specific Performance.) Where the seller has broken a contract to deliver specific or ascertained goods, a court having the powers of a court of equity may, if it thinks fit, on the application of the buyer, by its judgment or decree direct that the contract shall be performed specifically, without giving the seller the option of retaining the goods on payment of damages. The judgment or decree may be unconditional, or upon such terms and conditions as to damages, payment of the price and otherwise, as to the court may seem just.

Section 69. (Remedies for Breach of Warranty.) (1) Where there is a breach of warranty by the seller, the buyer may, at his election—

(a) Accept or keep the goods and set up against the seller, the breach of warranty by ways of recoupment in diminution or extinction of the price;

(b) Accept or keep the goods and maintain an action against the seller for damages for the breach of warranty;

(c) Refuse to accept the goods, if the property therein has not passed, and maintain an action against the seller for damages for the breach of warranty;

(d) Rescind the contract to sell or the sale and refuse to receive the goods, or if the goods have already been received, return them or offer to return them to the seller and recover the price or any part thereof which has been paid.

(2) When the buyer has claimed and been granted a remedy in any one of these ways, no other remedy can thereafter be granted.

(3) Where the goods have been delivered to the buyer, he cannot rescind the sale if he knew of the breach of warranty when he accepted the goods, or if he fails to notify the seller within a reasonable time of the election to rescind, or if he fails to return or to offer to return the goods to the seller in substantially as good condition as they were in at the time the property was transferred to the buyer. But if deterioration or injury of the goods is due to the breach of warranty, such deterioration or injury shall not prevent the buyer from returning and offering to return the goods to the seller and rescinding the sale.

(4) Where the buyer is entitled to rescind the sale and elects to do so, the buyer shall cease to be liable for the price upon returning or offering to return the goods. If the price or any part thereof has already been paid, the seller shall be liable to repay so much thereof as has been paid, concurrently with the return of the goods, or immediately after an offer to return the goods in exchange for repayment of the price.

(5) Where the buyer is entitled to rescind the sale and elects to do so, if the seller refuses to accept an offer of the buyer to return the goods, the buyer shall thereafter be deemed to hold the goods as bailee for the seller, but subject to a lien to secure the repayment of any portion of the price which has been paid, and with the remedies for the enforcement of such lien allowed to an unpaid seller by section 53.

(6) The measure of damages for breach of warranty is the loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty.

(7) In the case of breach of warranty of quality, such loss, in the absence of special circumstances showing proximate damage of a greater amount, is the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty.

Section 70. (Interest and Special Damages.) Nothing in this act shall affect the right of the buyer or the seller to recover interest or special damages in any case where by law interest or special damages may be recoverable, or to recover money paid where the consideration for the payment of it has failed.

DIVISION D
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NEGOTIABLE PAPER

DIVISION D

NEGOTIABLE PAPER

(Note: The outline of the Negotiable Instruments Act is in a general way followed.)

- Part XIV. Formation of Negotiable Contract.
- Part XV. Negotiation, Rights and Liabilities.
- Part XVI. Procedure to Fix Liability.
- Part XVII. Discharge of Negotiable Paper.
- Part XVIII. Bills of Exchange Particularly Considered.
- Part XIX. Promissory Notes and Checks Particularly Considered.

PART XIV

FORMATION OF THE NEGOTIABLE CONTRACT

- | | |
|----------------------|---|
| Chapter Fifty. | Formal Requisites: In General. |
| Chapter Fifty-one. | Formal Requisites: The Writing and the Signature. |
| Chapter Fifty-two. | Formal Requisites: Unconditional Promise or Order. |
| Chapter Fifty-three. | Formal Requisites: Certainty of Sum and Payment in Money. |
| Chapter Fifty-four. | Formal Requisites: Certainty of Time of Payment. |
| Chapter Fifty-five. | Formal Requisites: Words of Negotiability. |
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CHAPTER FIFTY

FORMAL REQUISITES: (1) IN GENERAL

Sec. 295. The Requisites Stated.

Case No. 390. Uniform Negotiable Instruments Act, Sec. 1.

“An instrument to be negotiable, must conform to the following requirements:

“1. It must be in writing and signed by the maker or drawer;

“2. Must contain an unconditional promise or order to pay a sum certain in money.

“3. Must be payable on demand or at a fixed or determinable future time.

“4. Must be payable to order or to bearer; and

“5. Where the instrument is addressed to a drawee, he must be named or otherwise indicated therein with reasonable certainty.”

Question 390: (1.) State the essential characteristics of negotiable paper.

(2.) What are the common forms of negotiable paper?

CHAPTER FIFTY-ONE

FORMAL REQUISITES: (2) THE WRITING AND SIGNATURE

Sec. 296. Must Be in Writing and Signed by the Maker or Drawer.

Case No. 391. Geary v. Physic, 5 B. & C. 234.

Facts: Suit was brought by an indorsee of a promissory note against the maker. The indorsement was in pencil; and it was contended that this was not a good writing within the law of negotiable paper.

BAILEY, J.: “* * * I think that a writing in pencil is a writing within the meaning of that term at common law, and that it is a writing within the custom of merchants. I cannot see any reason why when the law requires a contract to be in writing, that contract shall be void if it be written in pencil. * * *”

Question 391: State the above case.

(Note: Obviously the provision that the instrument must be signed by maker or drawer does not preclude the execution of the instrument by an agent. See Cases 198 and 199, *supra*, and Sec. 316, *post*. Also the signature may be a fictitious or assumed one.)

Case No. 392. Jones v. Home Furn. Co., 41 N. Y. Supp. 71.

Facts: Stated in the opinion.

Point Involved: Whether within the law of negotiable paper an instrument may be validly indorsed (or signed) by the use of a fictitious name.

HATCH, J.: "Separate actions were brought upon three promissory notes. The notes, which were made payable to the order of 'National Publishing Company,' and were signed by the defendant through its president, were each in the same form, excepting the dates and amounts. The defendant is a domestic corporation, having its place of business in Brooklyn. The National Publishing Company is a name assumed by plaintiff in carrying on his business, and represents nothing beyond that assumption. It is conceded that the notes were each given for a valuable consideration received by the defendant from the plaintiff, but the claim is made that the notes were made payable to a company that had no existence, and that, therefore, the paper was fictitious; and that as the indorsement was fictitious and spurious no title passed to the notes. This defense savors of delay and the use of legal remedies to prevent collection of a *bona fide* debt. The notes were as much payable to Jones when they were made payable to the name under which he carried on his business as though he had been named therein. It was not in legal contemplation a fiction, but it was the plaintiff under this business name and represented him. When the notes were made and delivered to plaintiff under these conditions they created a liability against the defendant in plaintiff's favor."

Question 392: (1.) Does the requirement that a negotiable instrument must be signed by the maker or drawer preclude the use of a fictitious or assumed name?

(2.) If John Brown signs a note, for some reason using, to designate himself, the name of Harry Jones, can John Brown be sued on this instrument?

(3.) A works for a certain company and is known as employee No. 12. He borrows money from a fellow employee and gives his note beginning "I promise to pay" and signed "12." Can the maker of this note be held thereon? (*Brown v. Bank*, 6 Hill 443.)

CHAPTER FIFTY-TWO

FORMAL REQUISITES: (3) UNCONDITIONAL PROMISE OR ORDER

§ 297. In general.

§ 298. Statement of transaction or
consideration as qualifying
promise or order.

§ 299. Reference to fund, account,
etc., as qualifying promise
or order.

Sec. 297. In General.

Case No. 393. Berenson v. L. & L. Fire Ins. Co., 201
Mass. 172.

Facts: Berenson sues the London and Lancashire
Fire Insurance Co. and Givernaud, upon the following
paper held by Berenson as indorsee or assignee for value:

"Upon acceptance the Connecticut Trust & Safe De-
posit Co. will pay to the order of Solomon Yaffee Three
Hundred Sixty and 43/100 dollars, which acceptance evi-
denced by proper endorsement hereof constitutes full
satisfaction of all claims and demands for loss and dam-
age by fire on December 25, 1906, to property described
in policy No. 6442019 issued at the Lynn agency and said
policy is hereby cancelled and surrendered to the Com-
pany.

*"To the London & Lancashire Fire Insurance Co. of
Liverpool, England. Agency Department, Hartford,
Conn. (Sd.) Joseph F. Givernaud, Special Agent."*

This instrument he describes in his pleadings as being
either a negotiable instrument or a non-negotiable chose
in action, and seeks to recover on either theory. He sets
out that Solomon Yaffee was the holder of a fire insur-

ance policy issued by defendant company upon his stock of goods, that same was destroyed by fire, and that the special agent, Givernaud, issued the above instrument as an adjustment, directed to the defendant at its general agency at Hartford, and that plaintiff became the holder for value of said instrument, by purchase from Givernaud and has applied to defendant company for payment and that said company refuses to pay. He therefore seeks to hold the insurance company as the assignee of a chose in action made by it through its agent or Givernaud as the drawer of a bill of exchange.

RUGG, J.: "If the words 'upon acceptance' could be eliminated, it would plainly be a foreign bill of exchange drawn by Givernaud, either individually or as agent, for and in behalf of the defendant insurance company upon the latter at its Hartford agency, payable at the Connecticut Trust and Safe Deposit Company. *Carpenter v. Farnsworth*, 106 Mass. 561; *Chipman v. Foster*, 119 Mass. 189. But these words are in the instrument, and must be given a reasonably intelligible effect if possible. All the language employed may be examined for the purpose of ascertaining the meaning attributed by the parties to those in dispute. The paper was made with the intent that, when paid, it should operate as a settlement of claims for damage arising from a fire to property described in a policy of the defendant insurance company and as a cancellation of the policy. The signature is by one who describes himself as 'special agent.' Reading this language in conjunction with the words 'upon acceptance' seems to make the transaction plain. A fire had injured property insured by the defendant insurance company. The loss, for which it was responsible under the terms of its policy, had been tentatively adjusted between the insured and a special agent of the insurance company, whose authority to make payment or sign an instrument fixing its liability was limited to the extent of requiring approval or ratification by the Hartford agency of the defendant insurance company. Therefore, the agent of

limited authority drew the paper in suit directed to the agency, whose approval was required to give life to his adjustment, stating the amount of loss agreed upon, but making the vitality of the instrument dependent upon the act of approval or acceptance by that agency. Amplification of the words 'upon acceptance' expressive of the same meaning would be 'upon acceptance of this contract by the agency department at Hartford, Connecticut, of the London and Lancashire Fire Insurance Company of Liverpool, England, and not before.' But the significance of all this is compressed into the words 'upon acceptance' in view of the other language of the instrument. It is in effect a check drawn upon the account of the defendant insurance company in the Connecticut Trust and Safe Deposit Company which is not to be valid until countersigned by the proper officers of the defendant company at its Hartford agency.

"The defendant Givernaud is not liable. If the words 'upon acceptance' had been omitted he would then have made the ordinary contract of the drawer, namely, absolutely to pay the face of the bill if not accepted by the drawee or if accepted and not paid by him. But by inserting these words he made his whole liability contingent upon there being an acceptance.

"Although no case exactly like this is to be found in our reports, it is within the familiar principle that contracts to be performed only upon condition are not negotiable instruments. *Grant v. Wood*, 12 Gray, 220; *Costelo v. Crowell*, 127 Mass. 293, and cases cited. The instrument, not having been accepted or approved by the Hartford agency of the defendant insurance company, never became a complete and operative contract. It was not a chose in action upon which recovery could be had without acceptance by the defendant insurance company. Hence there was nothing to assign. Indeed the plaintiff does not seriously argue that it was a complete chose in action."

Question 393: (1.) What words in the above instrument made it non-negotiable? Why?

(2.) If the instrument had been a negotiable bill of exchange would the Insurance Company have been liable without acceptance? Why?

(3.) If it had been a negotiable bill of exchange would the drawer have been made liable upon non-acceptance? Why?

Case No. 394. White v. Cushing, 88 Maine, 339.

Facts: The plaintiff, White, as indorsee of an order, sued defendant, Cushing, as the maker thereof, and it became material for the purpose of the suit to inquire whether the order was a negotiable bill of exchange.

The order reads as follows:

“120. Dover, Oct. 27th, 1893.

Piscataquis Savings Bank.

Pay James Lawlor, or order, One Hundred and Twenty Dollars and charge same to my account on Book No.

(Signed) J. N. CUSHING.”

“Witness:

.....

The bank book of the depositor must accompany this order.”

Point Involved: Whether the provisions in an order to the effect that it is payable on condition that of the production of a bank book, is negotiable.

FOSTER, J.: “* * * the objection that is raised to the negotiability of this instrument is * * * that it is subject to such a contingency as necessarily embarrasses its circulation and imposes a restraint upon its negotiability by means of these words contained upon the face of the order: ‘The bankbook of the depositor must accompany this order.’ Although these words are upon the face of the order below the signature of the drawer, they were there at the time of its inception, became a substantive part thereof and qualified its terms as if they had been inserted in the body of the instrument. * * * Without these words, the order is payable absolutely

* * *. With them the order is payable only upon a contingency or condition and that is, upon the production of the drawer's bank book. * * * It cannot therefore be regarded as payable absolutely and without any contingency that would embarrass its circulation. The drawer has it in his power to defeat its payment by withholding the bank book. * * * It was the necessity of certainty and precision in mercantile affairs and the inconvenience that would result if commercial paper was encumbered with conditions and contingencies that led to the establishment of an inflexible rule that to be negotiable they must be payable absolutely and without any condition or contingencies, to embarrass their circulation. * * *

Question 394: (1.) State the facts, the question presented and the court's decision in this case, giving the reasons why the above instrument was held non-negotiable.

Sec. 298. Statement of Transaction or Consideration as Qualifying Promise or Order.

Case No. 395. Uniform Negotiable Instruments Act, Sec. 3.

"An unqualified order or promise to pay is unconditional within the meaning of this act, though coupled with: * * * 2. A statement of the transaction which gives rise to the instrument."

Question 395: State this provision of the Neg. Instr. Act.

Case No. 396. Hereth et al. v. Meyer, 33 Ind. 511.

Facts: Suit by indorsee against the maker of a note, containing the clause "This note given for a patent right." Defense, that the note was secured by the original payee through fraud, and that it is not negotiable because of the clause mentioned, and that, therefore, the indorsee is subject to the defenses that could have been made against the payee.

Point Involved: Whether a statement in a note of the consideration for which it was given, affects its negotiability.

DOWNEY, J.: “* * * This Court knows judicially, from its own records, that numerous and great frauds are practiced upon the unwary in the sale of patent rights, and it is probable this is another to be added to the number. But when a party purchasing such a right has executed his note, governed, as this one is, by the same law which governs inland bills of exchange, and when that note has passed, by indorsement into the hands of a *bona fide* holder for value, new and important rights arise, which the law must protect. * * *

“Mercantile paper, by legal inference, imports a consideration. But if this implication is strengthened by a statement on the face of the paper that there was a consideration and in what the consideration consisted, can it be said that this shall impair or degrade the character of the security?

“If it be stated in the note that it is given for a tract of land, a span of horses, or a ‘patent right,’ can it be said that such statement takes away from the instrument its negotiable character according to the law merchant and opens up to the maker every defense which he might have had if the note had remained in the hands of the payee? We are satisfied that such is not the law.”

Question 396: (1.) State the facts, the question presented and the Court’s decision.

(2.) Why does the statement of the consideration not affect negotiability?

(Note: By local statute a note stating on its face that it is given for a *particular kind* of consideration may be non-negotiable for reasons of public policy. Thus it is provided in the New York, Ohio, and Indiana law (enacted in Indiana after the above case was decided) that notes given for patent rights shall so state that fact upon their face and shall thereupon pass to purchasers subject to all defenses that would be good against

the original holder; if such statement is omitted the note is unenforceable between the parties, but is good in the hands of a holder in due course; *New v. Walker*, 108 Ind. 365. So in some states, a note secured by *chattel mortgage* is subject to the same qualifications.)

Case No. 397. *Siegel v. Bank*, 131 Ill. 569.

Facts: Siegel, Cooper & Co., merchants of Chicago, contracted with D. Dalziel, for street car advertising to be placed by him, and gave in consideration for his undertakings the following note:

“\$300.

Chicago, March 5, 1857.

On July 1, 1887, we promise to pay D. Dalziel, or order, the sum of three hundred dollars, for the privilege of one framed advertising sign, size — x — inches, one end of each of one hundred and fifty-nine street cars of the North Chicago City Railway Co., for a term of three months, from May 15, 1887.

SIEGEL, COOPER & Co.”

and the maker defended that the instrument was not negotiable because of the statement of the transaction on the face of the instrument and that therefore the bank ought to be liable to the defense of non-performance to which Dalziel would have been subject, were he still the holder.

Point Involved: Whether a statement of the consideration for which a note is given makes it non-negotiable, and therefore subjects the holder to the defenses good against his transferror.

MR. CHIEF JUSTICE SHOPE delivered the opinion of the Court:

“The first question presented is, is this instrument negotiable?—and this question has been answered affirmatively by the circuit and appellate courts. The appellate court having affirmed the judgment in favor of the plaintiff, the case is brought here by appeal, upon a certificate of importance granted by that Court.

“It appears, that before the time when the privilege of advertising was to commence, Dalziel forfeited any right he may have acquired to use the cars in the manner indicated, and the privilege specified never was furnished appellants; and it is insisted that the instrument is a simple contract, only, and that therefore the same defense—failure of consideration—is available against the indorsee of the paper for value, and before due, as might be interposed against such paper in the hands of the payee. It is also insisted, that the instrument shows, on its face, that payment depended upon a condition precedent to be performed by the payee, and therefore the indorsee took it with notice, and by the failure of the payee to perform the condition, no right of recovery exists in the indorsee. It is not contended that the indorsee had any other notice than that contained in the instrument itself, and it is apparent that at the time of its indorsement, which was the day of its execution, no right to the consideration had accrued to the makers. It is a promise to pay a certain sum of money at a day certain, for a consideration thereafter to be rendered, and depends for its validity upon the implied promise of the payee to furnish the consideration at the time and in the manner stipulated,—that is, it is a promise to pay a sum certain on a particular day, in consideration of the promise of the payee to do and perform on his part. A promise is a valuable consideration for a promise.

“But the question remains, whether the statement or the recital of the consideration on the face of the instrument impairs its negotiability, and in this instance, amounts to a condition precedent. The mere fact that the consideration for which a note is given is recited in it, although it may appear thereby that it was given for or in consideration of an executory contract or promise on the part of the payee, will not destroy its negotiability, unless it appears, through the recital, that it qualifies the promise to pay, and renders it conditional or uncertain, either as to the time of payment or the sum to be paid.

* * *

“* * * Nor is there anything in the recital of the consideration to put the indorsee upon inquiry at the time the indorsement was made. Indeed, it is clear that at that time no inquiry would have led to notice that Dalziel would fail to comply with his contract on the 15th of May thereafter, when the term was to commence. All that the recitals would give notice of was, that the note was given in consideration of an agreement on the part of the payee that the privilege of advertisement named should be enjoyed by the makers for three months, from May 15, 1887. Giving to the language employed its broadest possible meaning, it cannot be construed as notice to the indorsee of the future breach of the contract by Dalziel. The presumption of law would be, that the contract would be carried out in good faith, and the consideration performed as stipulated. The makers had put their promissory note into the hands of Dalziel upon an expressed consideration which they were thereafter to receive, and for the performance of which they had seen fit to rely upon the undertaking of Dalziel, and we are aware of no rule by which they can hold this indorsee for value, before due and before the time of performance was to begin, chargeable with notice that the promise upon which the makers relied would not be kept and performed. Wade on Notice, sec. 94a; Loomis v. Maury, 15 N. Y. 312; Davis v. McCready, *supra*.”

Question 397: What was the defense raised in this case? Did it prevail? Why?

Case No. 398. Mott v. Havana Nat. Bank, 22 Hun (N. Y.) 354.

Facts: Suit upon the following note:

“\$450.00. New York, October 15, 1875.

Fourteen and one-half months after date, I promise to pay to the order of the American Engine Company, \$450 at seven per centum, at the Havana National Bank at Havana, N. Y., value received, being in part payment for a portable engine, which engine shall be and remain the

property of the owner of this note, until the amount secured hereby is fully paid.

No. due Jan. 4, 1877. FRED L. NIGHTHART."

This note was endorsed before maturity to the plaintiff Mott, and bore also the endorsement of Gilbert Woodward as accommodation endorser for Nighthart. The note was sent the defendant bank for collection and the bank is now sued for failure to notify the indorser. Defense that the note described is not negotiable and that therefore the indorser was not entitled to notice of non-payment within the rules governing negotiable paper.

Point Involved: Whether the statement in the note of the fact that it was given for the purchase of a particular article of property, and that the title thereto was retained in the seller until full payment of the indebtedness, destroyed its negotiability.

TALCOTT, P. J., delivered the opinion of the Court: " * * * The note in this case was an agreement to pay the money specified in it to a certain payee, on a day certain, and contained all the requisites of a negotiable promissory note; and the addition of the statement of the consideration, to-wit, the engine, with the statement that it was to remain the property of the owner until the note was paid, did not render it non-negotiable."

Question 398: State the facts, the question presented and the Court's decision in the above case.

(Note: Chicago Rwy. Equipment Co. v. Merchants Nat. Bank, 136 U. S. 268; Choate v. Stevens, 116 Mich. 28; W. W. Kimball Co. v. Mellen, 80 Wis. 133; *accord.* Third National Bank v. Armstrong, 25 Minn. 530; Killam v. Schoeps, 26 Kan. 310, *contra* [unless the further provision that the seller may retake possession makes a distinction].)

Case No. 399. Klots Throwing Co. v. M'f'rs Com'l Co., 179 Fed. 813.

Facts: Note set out below was made by defendant Klots Throwing Machine Co., to the payee therein named

and by such payee endorsed and delivered for value before maturity to the Manufacturers Commercial Company. The maker refused to pay the note on the ground that the payee had not performed the contract for which the note was given, and claims that the present holder is subject to such defense, though purchasing without notice thereof, on account of the claim that the note is non-negotiable. The note read as follows:

“\$3,166.00. New York, January 15th, 1906.

Six months after date we promise to pay to the order of the Regenerated Cold Air Company, Thirty One Hundred and Sixty Six 0/100 dollars at 487 Broadway, New York City, with interest at six per cent. per annum.

Value received, subject to a contract between maker and payee of October 25, 1905.

No. Due July 15th, '06.

KLOTS THROWING COMPANY,
H. D. Klots, President.”

Point Involved: Whether a note otherwise negotiable in form is rendered non-negotiable by the statement therein that it is “subject to a contract between the parties.”

NOYES, CIRCUIT JUDGE, delivered the opinion of the Court: “* * * In our opinion when a note contains special stipulations, and its payment is subject to contingencies, it fails to possess the character of a negotiable instrument, and is subject in the hands of an assignee to any defense which would be available if it were still held by the original payee. * * * let us suppose that the note in question contained the following stipulation: ‘This note in the hands of all holders is subject to all defenses which would be available to the maker based upon the contract between the maker and the payee of October, 1905, in the same manner and to the same extent as if it were held by the payee. * * *’

“The real inquiry in the present case is whether the promise in the note should be treated as a substantial

equivalent of the suppositious promise we have examined. Manifestly, if the provision * * * merely constitutes notice of the existence of the contract, and not of the breach thereof, it would not affect negotiability. But the evident purpose of the parties was to go further, and make it subject to and to impress upon it the defenses to which the maker would be entitled under the contract. The assignee took it in that condition. To deprive the maker of those defenses, upon the ground of the negotiability of the note, would work great injustice, and we think we are not required to reach such a result. As between the maker and payee of a note, payment is as a matter of law, subject to existing equities and defenses, even in the absence of any statement to that effect in the note. It is not too much to hold that when a promise is expressly limited by a provision in the note itself, assignees should take it subject to such limitation. * * *

“In *American Exchange Bank v. Blanchard*, 7 Allen, 333, an instrument containing a promise to pay a stipulated sum at a fixed time, ‘subject to the policy’ was held in a suit by the indorsee, not to be a negotiable promissory note because the promise was not absolute. The Court said: ‘* * * To determine whether at its maturity any money would become due upon it, it would be necessary to have recourse to the policy therein referred to, and to ascertain whether any loss had occurred which would constitute a valid claim against the company. * * *’

“* * * We reach the conclusion that the note in question was not negotiable. * * *”

Question 399: (1.) State the facts, the question presented and the Court’s decision in the above case.

(2.) What was the case of *American Exchange Bank v. Blanchard*?

Sec. 299. Reference to Fund, Account, etc., as Qualifying Promise or Order.

Case No. 400. Uniform Negotiable Instruments Act, Sec. 3.

“An unqualified order or promise to pay is unconditional within the meaning of this act, though coupled with:

“1. An indication of a particular fund out of which reimbursement is to be made, or a particular account to be debited with the amount; * * *

“* * * But an order or promise to pay out of a particular fund is not unconditional.”

Question 400: State the above rule.

Case No. 401. First National Bank v. Lightner, 74 Kan. 736.

Facts: Suit against First National Bank of Hutchinson, Kansas, against George W. Lightner, on his acceptance of two orders mainly identical, of which one read as follows:

“Hutchinson, Kansas, Aug. 10, 1903.
G. W. Lightner, Offerle, Kansas.

Dear Sir:

Pay to the order of the First National Bank of Hutchinson, Kansas, \$1500 on account of contract between you and the Snyder Planing Mill Company.

THE SNYDER PLANING MILL Co.,
Per J. F. Donnell, Treasurer.

Accepted: G. W. Lightner.”

The question presented was whether this order was negotiable.

Point Involved: Whether an instrument otherwise negotiable is rendered non-negotiable by the statement that it is to be paid on account of a particular contract stated to exist between drawer and drawee.

PORTER, J.: “* * * The main controversy is whether the orders given by the planing mill company to the bank and accepted by defendant are negotiable instruments. It is true that no specific time of payment is mentioned but that does not affect their validity as such instruments; and where no date is mentioned they are payable on de-

mand. * * * Each of them, therefore, possesses all the essential elements of a bill of exchange, unless the words 'on account of contract between you and the Snyder Planing Mill Company' make them payable out of a particular fund, and conditionally, so that the acceptance is thereby qualified.

"The law is well settled that a bill or note is not negotiable if settled out of a particular fund. * * * But a distinction is recognized where the instrument is simply chargeable to a particular account. In such a case it is beyond question negotiable; payment is not made to depend on the sufficiency of the fund mentioned, and it is mentioned only for the purpose of informing the drawee as to his means of re-imbursement. * * *

"The test in every case is said to be 'Does the instrument carry the general personal credit of the drawer or maker, or only the credit of a particular fund?' * * *

"We are of opinion that these orders cannot be construed as drawn upon a particular fund. * * * In our views they were negotiable. * * *

Question 401: (1.) State the facts, the question presented and the Court's decision in the above case.

Case No. 402. Meany v. Pool & McCord, 136 N. Y. 610.
Facts: See the opinion.

CLARK, J.: " * * * The paper set out in the complaint is not a negotiable instrument. * * * This instrument provides as follows: 'This amount to be paid out of our profits on the 3 East 40th Street job.' Being, therefore, a promise to pay out of a particular fund it is not unconditional. * * *

Question 402: State this case.

Case No. 403. National Savings Bank v. Cable, 73 Connecticut Reports, 568.

TORRANCE, J.: “* * * The counterclaim also failed to show any consideration for the order or its acceptance. If the order had been negotiable, it might have been held to import a consideration, but it is not negotiable. It is payable out of a particular fund; it is to pay \$300, or what would be due on a specified book; the amount to be paid is made to depend upon the adequacy of a specified fund; such an order is conditional, and so not negotiable.
* * *

Question 403: State the above case.

Case No. 404. Worden v. Dodge, 4 Denio, 159.

BEARDSLEY, J.: “* * * A promissory note must be payable absolutely and not upon any contingency as to time and event. * * *

“This was not such an engagement, for although the promise was to make engagements at certain specified times, the payments were to be made ‘out of the net proceeds’ ‘of ore to be raised and sold’ from a certain ore bed. Here was a contingency; the fund might turn out to be inadequate, in which case there would be no obligation to pay at any time. It was not a promise to pay ‘absolutely and at all events’ as a (negotiable) promissory note always is.”

Question 404: State the above case.

CHAPTER FIFTY-THREE

FORMAL REQUISITES: (4) CERTAINTY OF SUM AND PAYMENT IN MONEY

§ 300. Certainty of sum.

§ 301. Payment in money.

Sec. 300. Certainty of Sum.

Case No. 405. Smith v. Nightingale, 2 Starkie, 375.

Facts: Suit was brought upon the following instrument describing it as a negotiable promissory note.

“October 12, 1807.

“I promise to pay James Eastling, my head carter, the sum of 64l. with lawful interest for the same, three months after date, and also all other sums which may be due to him.”

(Signed by defendant.)

It was objected that this note was not negotiable.

LORD ELLENBOROUGH was of the opinion that the instrument was too indefinite to be considered as a promissory note; “it contained a promise to pay interest for a sum not specified, and not otherwise ascertained than by a reference to defendant’s books; and since the whole constituted one entire promise, it could not be divided into parts.”

Question 405: State the matter in the above instrument which rendered it non-negotiable.

Case No. 406. Thorpe v. Mindeman, 123 Wis. 149; 68 L. R. A. 147.

Facts: Suit to foreclose a note and mortgage. The note contained the following provision: "The payment of this note is secured by a mortgage of even date herewith on real estate. If default shall be made in the payment of interest, or in case of failure to comply with any of the conditions or agreements of the mortgage collateral hereto, then the whole amount of the principal shall, at the option of the mortgagee or his representatives or assigns (notice of such option being hereby expressly waived) become due and payable without any notice whatever." The mortgage referred to contained the usual provisions that the mortgagor (the maker of the note) should pay all taxes, and should keep the property insured, or in default thereof the mortgagee might pay such insurance and add the same to the amount of the note, etc. This note was transferred to the present holder by an indorsement on the back of the note, as follows:

"For value received, I hereby sell, transfer and assign the within note, and the interest coupons thereto attached to Josephine Thorpe, without recourse."

Defense: That the note was without consideration, and that it is non-negotiable and that the plaintiff, therefore took it, subject to that defense.

Point Involved: Whether a provision in a note that it is secured by a real estate mortgage which contains provisions rendering amount of sum payable uncertain, makes the note payable for a sum uncertain, on the ground that both instruments are one transaction and must be construed together.

WINSLOW, J.: "* * * The general rule that agreements contemporaneously executed and pertaining to the same subject matter are to be construed together is so familiar and so frequently acted upon that it needs only to be stated. The question how far, if at all, this rule imports into a promissory note the collateral agreements contained in an accompanying mortgage, is the question to be considered in this case. * * * This

is a decidedly revolutionary proposition. If it be true both the business world and the courts have been sadly in error for many years. * * * If all the agreements contained in every mortgage are, as matter of law, imported into the note, these propositions would not be true, for the general rule (except as changed by statute) is that negotiable instruments cannot be bound up and fettered with collateral agreements for the doing of other things besides the payment of money, and retain their negotiable character. Upon the principle contended for, the most simple real estate mortgage would deprive the note which it secured of its negotiable character, because it would import into the note one or more collateral agreements which are not for the payment of money. Fortunately, it is not necessary to give so violent a shock to the well understood principles of law governing the negotiability of notes and mortgages. The appellant's contention really results from a confusion of ideas. They lay down the well-understood proposition that contemporaneous instruments relating to the same subject-matter are to be construed together, and conclude that it follows that a note and mortgage, though separately executed, are one instrument, and that the note is that instrument. The rule that instruments are to be construed together does not lead to this result. Construing together simply means that, if there be any provisions in one instrument limiting, explaining, or otherwise affecting the provisions of another, they will be given effect as between the parties themselves and all persons charged with notice, so that the intent of the parties may be carried out, and the whole agreement actually made may be effectuated. This does not mean that the provisions of one instrument are imported bodily into another, contrary to the intent of the parties. They may be intended to be separate instruments, and to provide for entirely different things, as in the very case before us. The note is given as evidence of the debt and to fix the terms and time of payment. It is usually complete in itself,—a single, absolute obligation. The

purpose of the mortgage is simply to pledge certain property as security for the payment of the note. The agreements which it contains ordinarily have no bearing on the absolute engagements of the note, but simply relate to the preservation of the security given by its terms; such as the payment of taxes, the insurance of houses, and the like. While the two instruments will be construed together wherever the question as to the nature of the actual transaction becomes material, this does not mean that the mortgage incorporated into the note, nor that the collateral agreements to pay the taxes, or to insure the property, or that the mortgagee might insure in case of default by the mortgagor and have an additional lien therefor, become parts of the note. These agreements pertain to another subject, namely, the preservation intact of the mortgaged property. The promise to pay is one distinct agreement, and, if couched in proper terms, is negotiable. The pledge of real estate to secure that promise is another distinct agreement, which ordinarily is not intended to affect in the least the promise to pay, but only to give a remedy for failure to carry out the promise to pay. The holder of the note may discard the mortgage entirely, and sue and recover on his note; and the fact that a mortgage had been given with the note, containing all manner of agreements relating simply to the preservation of the security, would cut no figure. A pleading alleging such facts would be stricken out as frivolous or irrelevant."

Question 406: Why is a reference in a note to a mortgage or trust deed, given to secure the note, and which contains provisions that may increase the extent of the security by indefinite amounts, without effect to destroy the negotiability of the note?

Case No. 407. Uniform Negotiable Instruments Act, Sec. 2.

"The sum payable is a sum certain within the meaning of this act, although it is to be paid:

- “1. With interest; or
- “2. By stated installments; or
- “3. By stated installments with a provision that in default in payment of any installment, or of interest, the whole shall become due; or
- “4. With exchange whether at a fixed rate, or at the current rate; or
- “5. With costs of collection or an attorney’s fee in case payment shall not be made at maturity.”

Question 407: (See the following cases and questions.)

Case No. 408. *Carlton v. Kenealy*, 12 M. & W. (Eng.) 139.

Facts: Suit against the maker by the indorsee of a promissory note promising to pay one T. C., or order, 52l. 10s. by two equal installments, on the first of May, 1843, and the first of November, 1843, and that the whole amount, 52l. 10s., should become immediately payable on default being made in payment of the first installment. The holder alleged that the first installment was not paid. The defendant contended that the note was by reason of the installment provision not negotiable.

PARKE, B.: “Now, to hold that actions could not be maintained upon such notes as this, would be to impugn all the established practice. Almost every note payable by installments has such a condition. It is not a contingency—it depends on the act of the maker himself; and on his default, it becomes a promissory note for the whole amount. * * *

“Judgment for the plaintiff.”

Question 408: State this case, the question presented and the Court’s decision.

Case No. 409. *Hastings v. Thompson*, 54 Minnesota Reports, 184.

Facts: See the opinion.

MITCHELL, J.: "The only point raised on this appeal is whether the instruments sued on are promissory notes, for, if they are, they are unquestionably negotiable under the law merchant. They are promises to pay specified sums of money in St. Paul, 'with current exchange on New York City;' and the only question is whether this provision as to exchange renders the sums required to discharge them uncertain, within the meaning of the familiar rule that one of the essential qualities of a promissory note is that the amount to be paid must be fixed and certain, and not contingent. In the definitions of a promissory note or bill of exchange it is generally, if not always, stated that the amount necessary to discharge it must be ascertainable from the face of the paper itself, without having to refer to any extrinsic evidence. Construing this definition literally, it must be admitted that the instruments in question do not strictly fall within it, for, of course, extrinsic evidence must be resorted to in order to ascertain the rate of exchange at a given time between two places. * * * The following are, in brief, the considerations which have led us to the conclusion that such instruments ought to be held to be promissory notes under the law merchant:

"1. The reason and the purpose of the rule that the sum to be paid must be certain is that the parties to the instrument may know the amount necessary to discharge it, without investigating facts not within the general knowledge of every one, and which may be subject to more or less uncertainty, or more or less under the influence or control of one or other of the parties to the instrument. The provision for the payment of the current rate of exchange between the place of payment and some other place is not within the reason of this rule, or subject to the evils or inconveniences which it was designed to prevent.

"2. The law merchant, including the law of negotiable paper, is founded upon, and is the creature of, commercial usage and custom. Custom and usage have really made the law, and courts, in their decisions merely declare it.

The law of negotiable paper is not only founded on commercial usage, but is designed to be in aid of trade and commerce. Its rules should, therefore, be construed with reference to and in harmony with general business usages, and, as far as possible, with the common understanding in commercial circles. * * *"

Question 409: What was the provision in this case that was in question as affecting the negotiable character of the note? Why did the Court decide that the note was negotiable notwithstanding such provision?

Case No. 410. Oppenheimer v. Bank, 97 Tenn. 20.

Facts: This was a suit in a court of equity to enjoin the bank from suing on three promissory notes, reading as follows:

"Trenton, Tenn., June 3, 1889.

"Nine months after date we promise to pay to the order of Curtiss Bros., or bearer, the sum of five hundred dollars negotiable and payable at the Exchange Bank of Trenton, Tenn., for value received. The drawers and endorsers severally waive presentment for payment, protest and notice of protest and non-payment of this note, and, in case of suit, agree to pay reasonable attorney's fees for collecting the same.

"\$500.00 due February 3, 1890.

"(sd) (By four parties.)"

The makers of the note allege that the notes were secured through fraud by Curtiss Brothers and that they are non-negotiable instruments because the sum named is uncertain in amount and that the present holders, therefore, take subject to the fraud.

Point Involved: Whether a provision for payment of "reasonable attorney's fees" in case suit becomes necessary for the collecting of the instrument renders the sum payable by the note uncertain, and the note therefore non-negotiable.

McALLISTER, J.: "* * * The next question presented is whether the stipulation in respect of payment

of attorney's fees, written in the face of the note, destroys its negotiability and thus dismantles the note, allowing proof of fraud in its execution. The question presented has given rise to much judicial controversy, and the decisions announced in different states and jurisdictions are by no means reconcilable, and, since the question is one of first impression in this state, we shall, after a review of the authorities adopt the view which most commends itself to our reason and judgment.

"Mr. Tiedeman, in the work already cited, Commercial Paper, Sec. 28 (b) says: 'Bills and notes, particularly the latter, sometimes contain stipulations that, if not paid voluntarily, the drawer or maker will pay the attorney and collection fee. It has been much discussed what is the effect of such a stipulation upon the legal character of the instruments to which they are added.

" 'A few decisions maintain that the stipulation is in the nature of a usurious charge and avoids the whole transaction under the laws prohibiting usury (citing authorities) * * *.

" 'In a large number of cases the stipulation is held to be valid, but because it renders the gross sum to be recovered on the instrument uncertain, its insertion in a bill or note is declared to destroy its negotiability.' (Citing authorities) * * *.

" 'There are also other cases which not only recognize the validity of the stipulation, but also the negotiability of the paper on which it appears.' (Citing authorities)

* * *

"Upon a careful review of the authorities, we can perceive no reason why a note, otherwise endowed with all the attributes of negotiability, is rendered non-negotiable by a stipulation which is entirely inoperative until after the maturity of the note and its dishonor by the maker. * * *

"We are, therefore, of opinion the decree of the chancellor adjudging said notes non-negotiable was erroneous.

* * * 22

Question 410: (1.) What was the provision in this case upon which contention was made? What was the basis of that contention? How did the Court hold?

(2.) Is the negotiable instruments law in accord with this case?

Sec. 301. Payment in Money.

Case No. 411. Roberts v. Smith, 58 Vermont, 492.

Facts: Suit on a note: "November 17, 1849. Two years from date for value received I promise to pay J. S. King or bearer one ounce of gold.

"(sd) E. P. Smith."

Defense: That the note is not negotiable, and cannot be sued on as such.

Point Involved: Whether an instrument not payable in money is negotiable.

VEASEY, J.: " * * * such an instrument is not negotiable because not payable in money. * * * It is but a promise to pay, that is, deliver, a certain amount of merchandise definite in amount. Because gold enters into the composition of money, we cannot assume that 'an ounce of gold' is money, or that it has a fixed and unvarying value. * * * Although it has the form of a promissory note, it is not such, and cannot be treated as such in pleading. It must be treated as a simple contract for the delivery of merchandise. * * * "

Question 411: State the above case and the Court's decision.

Case No. 412. Martin v. Chauntry, 2 Strange Reports (Eng.) 1271.

"The Court held on error from C. B. that a note to deliver up horses and a wharf, and pay money at a particular day could not be counted on as a note within the statute; and therefore reversed the judgment."

Question 412: What did the instrument in this case provide? Was it negotiable? Why?

Case No. 413. Matthews v. Houghton, 11 Maine Reports, 377.

Facts: Suit on the following note:

“Madison, July 31, 1826.

“For value received, I promise to pay Jacob Matthews or order forty-five dollars in grain, at the market price next January, or forty dollars in two years from next January and interest. (sd) Nathan Houghton.”

MUELLER, C. J.: “* * * There can be no possible doubt as to the character of the note, clearly it is not a negotiable note. * * *”

Question 413: Who had the option (the maker or holder) in paying the money or delivering the grain? Was the instrument negotiable?

Case No. 414. Hodges v. Schuler, 22 N. Y. 114.

Facts: Suit by the indorsee of a note against the indorsers. The note read as follows:

“RUTLAND AND BURLINGTON RAILROAD
COMPANY.

“No. 253. \$1,000.00

“Boston, April 1, 1850.

“In four years from date for value received, the Rutland and Burlington Railroad Company promises to pay in Boston, to Messrs. W. S. and D. W. Shuler, or order, \$1,000, with interest thereon, payable semi-annually, as per interest warrants hereto attached, as the same shall become due; or upon the surrender of this note, together with the interest warrants not due to the treasurer, at any time until six months of its maturity, he shall issue to the holder thereof ten shares in the capital stock in said company in exchange therefor, in which case interest shall be paid to the date to which a dividend of profits shall have been previously declared, the holder not being entitled to both interest and accruing profits during the same period.

(Signed)

Defense: That the defendant is not liable as indorser according to the rules of negotiable paper, for the default of the principal maker, because the paper sued on is not negotiable, being for the payment of money or stock, in the alternative.

Point Involved: Whether a promise in the alternative to pay money or do something else at the option of the holder, destroys negotiability of an instrument otherwise negotiable.

WRIGHT, J.: "The single question is, whether the defendants can be held as indorsers. It is insisted that they cannot, for the reasons, first, that the instrument set out in the complaint, is neither in terms nor legal effect a negotiable promissory note, but a mere agreement; the indorsement in blank of the defendants, operating, if at all, only as a mere transfer, and not as an engagement to fulfill the contract of the railroad company in case of its default; * * *.

"The instrument on which the action was brought has all the essential qualities of a negotiable promissory note. It is for the unconditional payment of a certain sum of money, at a specified time, to the payee's order. It is not an agreement in the alternative, to pay in money or railroad stock. It was not optional with the makers to pay in money or stock and thus fulfill their promise in either of two specified ways; in such case, the promise would have been in the alternative. The possibility seems to have been contemplated that the owner of the stock might, before its maturity, surrender it in exchange for stock, thus canceling it and its money promise; but that promise was nevertheless absolute and unconditional, and was as lasting as the note itself. In no event could the holder require money and stock. It was only upon a surrender of the note that he was to receive stock; and the money payment did not mature until six months after the holder's right to exchange the note for stock had expired. We are of the opinion that the instrument wants none of the essential requisites of a negotiable promissory note.

* * * The engagement of the railroad company was to pay the sum of \$1,000 in four years from date, and its promise could only be fulfilled by the payment of the money at the day named."

Question 414: In what capacity was the defendant sought to be held in this case? What was his defense? How did the court dispose of it? Who (the maker or holder) had the option given in the note?

Case No. 415. Negotiable Instruments Act, Sec. 6.

"The validity and negotiable character of an instrument are not affected by the fact that:

"* * *

"5. (It) designates a particular kind of current money in which payment is made."

Question 415: State the above provision.

Case No. 416. Keith v. Jones, 9 Johnson's Reports, 120.

Per Curiam: The first count in the declaration, and to which there is a general demurrer, is good. The note therein stated is a negotiable note, under the statute; and being declared to be payable in York State bills or specie, is the same thing as being made payable in lawful current money of the state; for the bills mentioned mean bank paper, which is here, in conformity with common usage and common understanding regarded as cash."

Question 416: What was the objection raised to the negotiability of the instrument in this case? How did the court answer it?

Case No. 417. Hogue v. Williamson, 85 Tex. 553.

Facts: Suit on a note reading as follows:

"Saltillo, Jan. 25, 1888. On or before May 1, 1888, I promise to pay C. C. Hogue or order, One Thousand Mexican Silver Dollars.

(Sd) Geo. S. Williamson."

The plaintiff, Hogue, put in evidence this note and proved the value in American money of Mexican silver dollars. He then rested his case. The defendant put in no testimony and asked judgment on the ground that plaintiff had proved no case. [In suit on a simple non-negotiable contract, the plaintiff must prove the consideration and the breach by defendant before he has made a *prima facie* case, but in a suit on a negotiable instrument a *prima facie* case is made by the proof of the instrument sued on.] Defendant had judgment below and plaintiff appeals to the present Court.

Point Involved: Whether an instrument which is payable in foreign money is negotiable.

GAINES, J.: “* * *

“We are of the opinion that the instrument in question is a promissory note. It is such in form and in substance, unless the fact that the sum payable is expressed in Mexican silver dollars should make a difference. Speaking of the sum for which a bill of exchange must be drawn, Mr. Chitty says: ‘It may be the money of any country.’ Chitty, Bills & Notes, 160. Judge Story says: ‘But, provided the note be for the payment of money only, it is wholly immaterial in the currency or money of what country it may be payable. It may be payable in the money or currency of England or France or Spain or Holland or Italy or of any other country. It may be payable in coins, such as in pounds sterling, livres, turnoises, francs, florins, etc., for in all these and the like cases the sum of money to be paid is fixed by the par of exchange, or the known denomination of the currency with reference to the par.’ Story, Prom. Notes, Sec. 17. The same rule is distinctly laid down in 1 Dan. Neg. Inst. Sec. 58, and in Tiedeman, Commercial Paper, Sec. 29b. * * *”

Question 417: (1.) What was the objection to the above instrument as negotiable paper? How did the court decide? Give its reason.

CHAPTER FIFTY-FOUR

FORMAL REQUISITES: (5) CERTAINTY OF TIME OF PAYMENT—DEMAND PAPER

(Payment must be on demand or at a fixed or determinable future time.)

§ 302. Demand paper.

§ 303. Fixed or determinable future time.

Sec. 302. Demand Paper.

Case No. 418. Uniform Negotiable Instruments Act, Sec. 7.

“An instrument is payable on demand:

“1. Where it is expressed to be payable on demand or at sight, or on presentation; or

“2. In which no time for payment is expressed.

“Where an instrument is issued, accepted or indorsed when overdue, it is, as regards the person so issuing, accepting or indorsing it, payable on demand.”

Question 418: When is a negotiable instrument payable on demand?

Case No. 419. Hall v. Toby, 110 Pa. St. 318.

Facts: Suit on the following note:

“551.50. Warren, Aug. 18, 1879.

“For value received, I promise to pay to Wm. Toby, or order, five hundred and fifty-one 50/100 dollars with interest.

(endorsed by Toby)

Orris Hall.”

Per Curiam: "This note was negotiable, * * * As no time of payment was therein expressed, the law adjudges the money to be payable immediately. A right of action accrued at once and would be barred by the Statute of Limitations at the expiration of six years thereafter * * *"

Question 419: What was the alleged defect in this instrument and how did the court dispose of the objection?

(Note: As to when demand paper is considered overdue, see cases 462 and 463, *post*.)

Sec. 303. Fixed or Determinable Future Time.

Case No. 420. Negotiable Instruments Act, Sec. 4.

"An instrument is payable at a determinable future time, within the meaning of this Act, which is expressed to be payable;

"1. At a fixed period after date or sight; or

"2. On or before a fixed or determinable future time specified therein; or

"3. On or at a fixed period after the occurrence of a specified event, which is certain to happen, though the time of happening be uncertain.

"An instrument payable upon a contingency is not negotiable and the happening of the event does not cure the defect."

Question 420: In what cases is an instrument payable at a determinable future time?

Case No. 421. *Mattison v. Marks*, 31 Michigan, 421.

COOLEY, J.: "* * * The objection to this instrument is, that it promises to pay a certain sum of money 'on or before' a day named; and this it is said is not a promise to pay on a day certain and consequently cannot be a promissory note. * * * It seems to us that this note is payable at a time certain. It is payable certainly and at all events, on a day particularly named;

and at that time, and not before, payment might be enforced against the maker. It is impossible to say that this paper makes the payment subject to any contingency, or puts it upon any condition. The legal rights of the holder are clear and certain; the note is due at the time fixed and is not due before. Thus the maker may pay sooner if he shall choose this option, but this option, if exercised, would be a payment in advance of the legal liability to pay, and nothing more. Notes like this are common in commercial transactions, and we are not aware that their negotiable quality is ever questioned in business dealings. * * *

Question 421: State the facts, the question presented and the Court's decision in this case.

Case No. 422. First National Bank of New Windsor v. Bynum, 84 N. C. 24.

ASHE, J.: “* * *

“But there is another serious objection to the claim set up for the negotiability of this instrument. It stipulates that the payee shall have power to declare the note due at any time they may deem the note insecure, even before the maturity of the same. This divests it of the quality of certainty in the time of payment. * * * The time of payment may be hastened at the option of the payees and is therefore uncertain. * * *

Question 422: State the facts, the question presented and the Court's decision in this case.

Case No. 423. Cook v. Colehan, 2 Strange's Reports (Eng.) 1217.

“On error from C. B. a note to pay A, or order (a certain sum) six weeks after the death of the defendant's father, for value received, was held to be a negotiable note within the statute 3 Ann. c. 9, for there is no contingency whereby it may never become payable, but it is only uncertain as to time, which is the case of all bills

payable at so many days after sight. In *communi banco* it held three arguments, and was held good upon a solemn resolution delivered by Chief Justice Willes.

Question 423: What was the question presented in the above case and how the Court decided it?

Case No. 424. Kelley v. Hemingway, 13 Illinois Reports, 60.

Facts: Suit by an indorsee on a note payable when the payee is "twenty-one years old." Evidence offered that he had arrived at that age.

TREAT, C. J.: "* * * If the terms of the instrument leave it uncertain whether the money will ever become payable it cannot be considered as a promissory note. * * * Thus a promise in writing to pay a sum of money when a particular person shall be married, is not a promissory note, because it is not certain that he will ever be married. * * * So of a promise to pay when a particular ship shall return from sea, for it is not certain the ship will ever return. * * * In all such cases the promise is on a contingency that may never happen. * * *

"* * * The fact that the payee lived till he was twenty-one years of age makes no difference. It was not a promissory note when made, and it could not become such by matter *ex post facto*. * * *"

Question 424: (1.) When was the above instrument payable? Was it negotiable? Did the happening of the event affect its character as a negotiable instrument?

(2.) Might this instrument be good as a non-negotiable contract? What else would have to appear?

(3.) Is the following instrument negotiable?

"Chicago, July 12, 1887.

"To A. B.:

"Please pay to M. N., or order, for stone in your building, \$600, in installments as follows: \$200 when first floor joists are in; \$200 when building is ready for roof; \$200 when stoops are finished; and charge same to my account.

"(sd.) C. D."

Case No. 425. Glidden v. Henry, 104 Ind. 278.

Facts: A note provided that the payee or holder might extend the time of payment indefinitely as they saw fit, thus giving the payee or holder the power to prevent, if so desired, the maturing of the note.

Point Involved: Whether the provision in a note that the holder may extend the time of payment at his pleasure renders the instrument non-negotiable.

THE COURT: “* * * From an inspection of the note it is impossible to tell when it may mature because it is impossible to know what extension may have been, or may hereafter be, agreed upon. No definite time is fixed, nor is the maturity of the note dependent upon an event that must inevitably happen. The condition is not that something may happen, or be done, that will mature the note before the time named, thus leaving that time as fixed and certain, if the thing do not happen, or be not done; but the condition is that the time named may be displaced by another, uncertain and indefinite time, as the parties may agree.

“This distinguishes the case from some of the cases cited by appellee, which hold that so long as a definite time of payment, as fixed in the note remains fixed and certain, the note retains its negotiability, although by certain agreed conditions it may be matured before that time. The case here is also distinguishable from another class of cases which hold that the time of payment may be dependent upon an event that must inevitably happen, such as the death of the maker, the coming of the seasons, etc. The precise question involved here has been passed upon by the supreme courts of Iowa and Michigan, and in each case it was held that the condition destroyed the negotiability of the note.

“We conclude from the foregoing that the notes in suit are not negotiable under the statute as inland bills of exchange, and that, therefore, whatever defenses appellant might have set up and made available as against Nugen, the payee, he may set up and make available as against appellee. * * *

“The judgment is reversed with costs.”

Question 425: State the provision in this note which was in question, and what the court decided?

Case No. 426. First National Bank of Pomeroy v. Buttery, 17 N. D. 326; 16 L. R. A., n. s., 878.

Facts: Suit on a note due Oct. 1, 1903, but containing the following provisions: “The makers on and indorsers herein severally waive presentment of payment and notice of protest and consent that the time of payment may be extended without notice.”

Point Involved: Whether this provision destroyed negotiability.

SPALDING, J.: “* * * There is an apparent conflict of authorities as to whether this or similar agreements render the note non-negotiable. * * * The doctrine of the courts seems to be that when the maker’s promise will at some time be absolutely enforceable and where the event and time and duty of payment is one over which the holder will have entire control, there is no such uncertainty regarding it, as renders the note non-negotiable. * * *”

MORGAN, CHIEF JUSTICE, dissenting: “I am unable to concur * * *. From the face of the note it seems to me conclusive that it does not show when the note may become due and payable * * *. It does not seem to me to be a sound conclusion to say that the note states a fixed day of payment when it also states that the day stated may not represent the date of payment if the stipulation as to extension that follows is put into effect. The note cannot be said to be a demand note, as by its very terms, it is not such. * * * On principal and authority the note should be held non-negotiable.”

Question 426: What was the provision in this note that brought its negotiability into question? Was the note held negotiable or not? Is the decision in conflict with Glidden v. Henry? Do you think the decision of the court or the dissenting opinion the stronger?

Case No. 427. Stitzel v. Miller, 250 Ill. 72.

Facts: Suit by an indorsee on a note containing the following provision: "We also agree that in case said note is not paid at maturity, that it is at the option of the holder hereof to extend, as he deems proper, the payment of the above note, and that said extension shall not in any manner release one or either of us from the payment hereof." Defendant contends that the note sued on as a negotiable instrument is not negotiable on account of this provision, and that therefore the indorsee could not bring suit thereon in his own name according to the rules of negotiable paper.

Point Involved: Whether the instrument sued on is rendered non-negotiable by the provision stated.

MR. JUSTICE CARTER: "* * *

"The contention that said quoted words gave the holder the authority to extend the note as he pleased; that it could not be known what extensions he might grant, and that therefore the time when the note become due and payable was uncertain and indeterminate, rendering the note non-negotiable, cannot be sustained. The note expressly provides that such option to extend can be exercised only upon the failure of the payors to make payment at its maturity. The time of payment is certain. The note is dated February 22, 1908, and payable one year thereafter. * * *"

Question 427: What were the provisions of this note? What reasons did the court give for holding it negotiable?

CHAPTER FIFTY-FIVE

FORMAL REQUISITES: (6) WORDS OF NEGOTIABILITY

§ 304. What are words of negotia-
bility?

§ 305. Such words a formal requisite.

§ 306. When instrument payable to
order.

§ 307. When instrument payable to
bearer.

Sec. 304. What Are Words of Negotiability.

Case No. 428. Negotiable Instruments Act, Sec. 1.

“An instrument to be negotiable * * * must be payable to order or to bearer.”

Question 428: What are words of negotiability?

Sec. 305. Such Words a Formal Requisite.

Case No. 429. *Wettlaufer v. Baxter*, 125 S. W. Reporter (Ky.) 741. (1910.)

Facts and Point Involved: Stated in the opinion.

CARROLL, J.: “In the State of New York on July 3, 1905, the Buffalo Carriage Top Company executed to Newton J. Baxter the following note: ‘January 15, 1906, after date we promise to pay to Newton J. Baxter, two hundred and fifty dollars at 58 Carroll St., Buffalo, N. Y.’ On the back of the note Newton J. Baxter wrote his name, and before its maturity, it was discounted by appellant, Wettlaufer, and delivered to him by Baxter. When the note fell due it was presented to the Buffalo Carriage Top

Company for payment and payment refused. Thereupon the note was protested by a notary and notice of its dishonor mailed to Baxter. * * * Baxter declining to pay the note, suit was brought on it against him. * * *

"The contention of counsel for Baxter is that the note was not a negotiable instrument. * * *

"* * * In an article in 7 Cyc, page 606, by a well known writer on commercial paper it is said: 'The usual form of negotiable paper is a provision for payment to "order" or "bearer."' These and similar words are in general necessary to its negotiability, * * *. Bills payable to bearer were formerly held to be non-negotiable, as being without words of transfer; but they are now recognized as negotiable and transferable by delivery. Making an instrument payable 'to the order of' a certain person is the same as to such person 'or order,' and in like manner to a person named 'or bearer' is the same in effect as 'to bearer.' Without words of negotiability, purchasers take the bill or note subject to all defenses which were available between the original parties, and if it was originally non-negotiable, as against the original parties, it will not be rendered negotiable by subsequent transfer in negotiable form.' * * *

"* * * This note in our opinion, which was payable to Baxter alone, and did not contain the words 'to order' or 'bearer' was not a negotiable instrument. * * *

Question 429: What was the objection raised to the negotiability of this instrument? Upon what facts did the suit arise? How did the court dispose of the objection?

Sec. 306. When Instrument Payable to Order.

Case No. 430. Negotiable Instruments Act, Sec. 8.

"It may be drawn payable to the order of:

"1. A payee who is not maker, drawer, or drawee;

"2. The drawer or maker; or

"3. The drawee; or

- “4. Two or more payees, jointly; or
- “5. One or some of several drawees; or
- “6. The holder of an office for the time being.

“When the instrument is payable to order the payee must be named or indicated therein with reasonable certainty.”

Question 430: In what various ways may an instrument be payable to order?

Case No. 431. Zander v. N. Y. Security & Trust Co., 78 N. Y. Supp. 900.

Facts: In this case there was a suit brought upon an instrument promising to pay to one Caroline Zander, “or to her assigns.” Further facts appear in the opinion.

Point Involved: Whether an instrument payable to one or his assigns may be regarded as payable to order.

“It is alleged by the complaint, and admitted by the demurrer that on or about July 11, 1901, the plaintiff deposited with the defendant the sum of \$500, and received therefor the following certificate or receipt:

“‘The New York Security and Trust Company, New York, July 11, 1901, has received from Caroline Zander the sum of five hundred dollars, of current funds, upon which the said company agrees to allow interest at the annual rate of three per cent. from this date, and on five days’ notice will repay, in current funds, the like amount with interest, to the said Caroline Zander or her assigns, on return of this certificate, which is assignable only on the books of the company.’

“Then followed provisions as to the reduction of discontinuance of interest, not material here.

“Plaintiff always remained the owner of the certificate; has never assigned it, or any part thereof, or in any way indorsed or transferred it, or any interest therein. Before August 9, 1901, she lost or inadvertently destroyed the certificate, and though she has diligently searched, she has been unable to find it, and on August 9, 1901, she notified defendant of the loss of the certificate. She has duly demanded of defendant the issue of a new certifi-

cate or the payment of the amount of the deposit. The demurrer is stated to be interposed merely for the purpose of enabling the defendant to insist that the plaintiff shall be required to give the security specified in section 1917, Code Civ. Proc. That section refers to lost negotiable paper, and the question which presents itself is, therefore, whether or not the certificate of deposit given by defendant is negotiable. Section 20, c. 612, Laws 1897, known as the 'Negotiable Instruments Law,' declares that an instrument, to be negotiable, 'must be payable to order or to bearer' and in this respect is merely declaratory of the law of negotiable paper as it existed before the passage of the statute. The papers which were before the Court in the cases principally relied upon by defendant conformed to the foregoing definition, and in each case the decision turned upon the fact that the lost receipts were payable to 'order,' which circumstance was held to render them negotiable instruments, and to require that indemnity be given before judgment upon them could be rendered. *Frank v. Wessels*, 64 N. Y. 155; *Read v. Bank*, 136 N. Y. 454, 32 N. E. 1083, 32 Am. St. Rep. 758. The receipt or certificate in the present case is not negotiable. The money represented by it is payable, not 'to order or bearer,' but to the plaintiff 'or her assigns.' It is therefore what is known to the law as a 'non-negotiable instrument.' In an action upon a lost or destroyed instrument of this description, it is not necessary that the plaintiff should give or tender indemnity."

Question 431: (1.) Why was it material in this case to consider whether this instrument was negotiable? What was its alleged defect as a negotiable instrument? What did the court decide?

(2.) Why should the law provide that the holder of negotiable paper should give bond in case of loss thereof, and not the holder of non-negotiable paper?

Sec. 307. When Instrument Payable to Bearer.

Case No. 432. Uniform Negotiable Instruments Act, Sec. 9.

“The instrument is payable to bearer:

“1. When it is expressed to be so payable; or

“2. When it is payable to a person named therein or bearer; or

“3. When it is payable to the order of a fictitious or non-existing person, and such fact was known to the person making it so payable; or

“4. When the name of the payee does not purport to be the name of any person; or

“5. When the only or last endorsement is an endorsement in blank.”

Question 432: When is an instrument payable to bearer?

Case No. 433. Willetts v. Phoenix Bank, 2 Duer, 121.

Facts: Suit on four checks, one being “to the order of 1658,” and three to the order of “bills payable.”

OAKLEY, C. J.: “* * * The law is well settled that a draft payable to the order of a fictitious person, inasmuch as title cannot be given by indorsement, is in judgment of law payable to bearer. * * *”

Question 433: How were these checks payable? Were they negotiable? Why?

Case No. 434. Bartlett v. First Nat. Bank, 247 Ill. 490.

Facts: This was a suit commenced by Bartlett, Frazier & Carrington against the First National Bank of Chicago, to recover the amount of 135 drafts drawn by B. F. & C. by their agent, R. L. Walsh, upon themselves, to the order of various persons, and fraudulently indorsed by said Walsh in the names of the payees and paid to Walsh by State Bank of Reddick and to said bank by First National Bank of Chicago, and to First National Bank of Chicago by B. F. & C., plaintiffs herein.

Point Involved: Whether an instrument drawn to the order of a payee by a name which represents an actual person, but who was not intended to have and never had

any interest in said instrument, is payable to a fictitious person and therefore payable to bearer.

MR. JUSTICE HAND: “* * * It appears from the record that Bartlett, Frazier & Carrington were engaged in the buying of grain in the city of Chicago, and at numerous places in the country; that in 1904 they were running an elevator at Reddick; that R. L. Walsh was the manager of the Reddick elevator; that he bought grain from the farmers residing in that vicinity and paid them for their grain by delivering to them drafts drawn upon blanks in the following form, which were furnished R. L. Walsh by Bartlett, Frazier & Carrington:

‘No. Bartlett, Frazier & Carrington. \$
 Pay to the order of
 Dollars for bushels and lbs. of
 Bartlett, Frazier & Carrington,
 By, Agent.
 To Bartlett, Frazier & Carrington, Chicago, Illinois.’

“The blanks were filled up by R. L. Walsh with the farmers’ names, the amount due them for grain and the kind of grain purchased. The drafts were cashed by the State Bank of Reddick, and by that bank forwarded to the First National Bank of Chicago, and by that bank collected of Bartlett, Frazier & Carrington. In the year 1905, to accommodate the farmers and to meet competition, R. L. Walsh would fill out the drafts, as above indicated, for grain and pay the farmers for their grain in cash, and then, without authority, endorse the drafts with the farmers’ names and obtain the amounts of the drafts from Bartlett, Frazier & Carrington by putting the drafts through the banks. * * *

“In November, 1906, it was discovered by the appellants that R. L. Walsh, by means of issuing drafts without receiving any grain therefor and endorsing them in the names of the payees and procuring the cash thereon from the State Bank of Reddick and passing them through

the First National Bank of Chicago, had obtained some \$12,500 in cash, which he converted to his own use.

“The appellants base their claim of liability against the First National Bank of Chicago upon the contention that the drafts by R. L. Walsh were forgeries. * * * It is undoubtedly the general rule that when a drawee pays a draft to an endorser who derives title to the draft through a prior forged endorsement he may recover back the money so paid. (First Nat. Bank v. Northwestern Nat. Bank, 152 Ill. 296.) * * *

“The drafts drawn by R. L. Walsh in the name of the appellants against themselves were all made payable to some person who resided near Reddick, or bearer, and in the sense that there were such individuals as payees the payees named in the drafts were not fictitious persons. At the time, however, Walsh drew said drafts he did not intend that the persons whose names he inserted as payees in said drafts should have any interest in said drafts, or that said drafts should ever be delivered to said payees, or that said payees should endorse said drafts in order to receive payment therefor or for the purpose of negotiating the same. In the eye of the law, therefore, the payees named in said drafts were not *bona fide* payees but mere fictitious persons. Said drafts were therefore, in law, payable to bearer, and were transferable, therefore, by delivery, and upon their receipt by the appellee payment thereof could be enforced against the appellants by the First National Bank of Chicago without claiming through the said forged endorsements but as the holders of negotiable paper made payable to bearer. * * * The First National Bank did not, therefore, make out its title to said drafts through a forged endorsement, and, appellants could not, therefore, recover back the money paid to the bank on said drafts. * * *

Question 434: Why were the instruments in question held to be payable to bearer?

CHAPTER FIFTY-SIX

SUNDRY PROVISIONS AND OMISSIONS NOT AFFECTING NEGOTIABILITY

§ 308. In general.

§ 309. Provision authorizing sale of collateral security.

§ 310. Confession of judgment clause.

§ 311. Waiver of benefit of exemption laws.

§ 312. Seal, omission of date, ante dating, post dating, etc.

§ 313. Rules of construction.

Sec. 308. In General.

Case No. 435. Uniform Negotiable Instruments Act, Sec. 5.

“An instrument which contains an order or promise to do an act in addition to the payment of money is not negotiable.

“But the negotiable character of an instrument otherwise negotiable is not affected by a provision which:

“1. Authorizes the sale of collateral securities in case the instrument be not paid at maturity; or

“2. Authorizes a confession of judgment; or

“3. Waives the benefit of any law intended for the advantage or protection of the obligator; or

“4. Gives the holder an election to require something to be done in lieu of payment of money.

“But nothing in this section shall validate any provision or stipulation otherwise illegal.”

Question 435: (See the following cases and questions.)

Sec. 309. Provision for Sale of Collateral Security.**Case No. 436.** Perry v. Bigelow, 128 Mass. 129.*Facts:* Contract on the following promissory note signed by the defendant and endorsed by payee:

“\$5,000. St. Louis, Mo., January 11, 1877.

“Four months after date I promise to pay to Frank F. Iglehart, cashier, or order, at the banking house of Bartholew, Lewis & Co., in St. Louis, Mo., five thousand dollars, for value received, negotiable and payable without defalcation or discount, and with interest from maturity at the rate of ten per cent. per annum, I having deposited with him as collateral security the following described certificates of the capital stock of the Scotia Lead Mining Company, No. 40 for 25 shares; 41 for 25 shares, 42 for 25 shares; 43 for 50 shares; 44 for 130 shares, and 39 for 25 shares, aggregating 280 shares. And hereby authorize him to sell the same at public or private sale or otherwise at his option, on the non-performance of this promise, without notice, and authorize him to use, transfer or hypothecate, the same at his option, he being required, on payment of the amount loaned as specified herein, and at any time before said collateral security shall have been sold, or surrender the same.”

(Remainder of facts omitted.)

AMES, J.: “The defendant’s written contract was a negotiable promissory note, requiring him to pay a certain sum of money at a definite time.

Question 436: What does this case decide?**Sec. 310. Confession of Judgment Clause.****Case No. 437.** Wisconsin Yearly Meeting of Freewill Baptists v. Babler, 115 Wis. 289.*Facts:* This was an action in equity, brought by respondent, a corporation, to set aside the sale and transfer to the appellant of a certain promissory note and mortgage, which was the property of the respondent and to

recover the possession of the same. The note contained a power of attorney which authorized a confession of judgment at any time thereafter, whether due or not.

Point Involved: Whether a power of attorney to confess judgment at any time on the note whether due or not, renders the note non-negotiable.

WINSLOW, J.: "It is entirely clear from the evidence in the case and from the findings of fact that the note and mortgage were the property of the plaintiff corporation, and that no express authority had ever been given to Sears to sell them. Those being the facts, the defendant, Babler, could acquire no title to the note by this transaction with Sears unless the note was negotiable paper, or unless Sears had either the apparent ownership or apparent authority to sell it, so that the corporation would be estopped to deny the act. It is quite certain the note was not negotiable, because by the power of attorney it contained judgment could be entered upon it at any time after its date, whether due or not. Thus the time of payment depends upon the whim or caprice of the holder, and is absolutely uncertain. This deprives the note of its negotiability. * * * Ch. 356, Laws of 1879 (the negotiable instruments law) provides that the negotiable character of an instrument is not affected by a provision authorizing a confession of judgment if the instrument is not paid at maturity. Sec. 1675—5, subd. 2. Upon familiar principles of statutory construction this provision makes a note like the present non-negotiable.

* * *

Question 437: What is a judgment note? Does it necessarily make a note non-negotiable? What was the holding in this case? When will a confession of judgment clause have no effect on negotiability?

Sec. 311. Waiver of Benefit of Exemption Laws.

Case No. 438. Zimmerman v. Anderson, 67 Pa. 421.

Facts: Suit on following note:

"\$125.00.

Town of Buffalo, March 25th, 1868.

"Six months after date I promise to pay to G. W. Lowe, or order, one hundred and twenty-five dollars for value received, with interest, waiving the right of appeal and of all valuation, appraisement, stay and exemption laws.

MOSES ANDERSON."

It was contended the note was not negotiable.

Point Involved: Whether a waiver in an instrument of benefit of exemption and similar laws, renders the note non-negotiable.

READ, J.: "* * * But it is urged that the words 'waiving the right of appeal, and of all valuation, appraisements, stay and exemption laws' destroy its negotiability. In what way? They do not contain any condition or contingency but after the note falls due and is unpaid, and the maker is sued, facilitate the collection by waiving certain rights which he might exercise to delay or impede it. Instead of clogging its negotiability it adds to it, and gives additional value to the note.

* * *"

Question 438: What did the court decide in this case?

(Note: Whether the waiver of the exemption law is *valid* is another question. Whether valid or not, it does not destroy negotiability. In some states certain exemption laws intended to prevent the debtor from becoming a charge on the state cannot be waived by the debtor, especially exemption in wages intended not only for the debtor's benefit but also the benefit of his family.)

Sec. 312. Seal, Omission of Date, Ante-Dating, Post-Dating, etc.

Case No. 439. Uniform Negotiable Instruments Act, Sec. 6, 10-13.

"Sec. 6. The validity and negotiable character of an instrument are not affected by the fact that:

“1. It is not dated; or

“2. Does not specify the value given, or that any value has been given therefor; or

“3. Does not specify the place where it is drawn or the place where it is payable; or

“4. Bears a seal; or

“5. Designates a particular kind of current money in which payment is to be made.

“But nothing in this section shall alter or repeal any statute requiring in certain cases the nature of the consideration to be stated in the instrument.

“Sec. 10. The instrument need not follow the language of this Act, but any terms are sufficient which clearly indicate an intention to conform to the requirements hereof.

“Sec. 11. When the instrument or an acceptance or any indorsement thereon is dated, such date is deemed *prima facie* to be the true date of the making, drawing, acceptance or indorsement, as the case may be.

“Sec. 12. The instrument is not invalid for the reason only that it is ante-dated or post-dated, provided this is not done for an illegal or fraudulent purpose. The person to whom an instrument so dated is delivered acquires the title thereto as of date of delivery.

“Sec. 13. When an instrument expressed to be payable at a fixed period after date is issued undated, or where the acceptance of an instrument payable at a fixed period after sight is undated, any holder may insert therein the true date of issue or acceptance, and the instrument shall be payable accordingly. The insertion of a wrong date does not avoid the instrument in the hands of a subsequent holder in due course, but as to him, the date so inserted is to be regarded as the true date.”

Question 439: (1.) If an instrument is otherwise properly drawn, is it negotiable, if it

(a.) Is not dated?

(b.) Does not state the value or recite the words
“value received”?

(c.) Does not specify place of drawing or of payment?

(d.) Bears a seal?

(e.) Specifies the kind of money in which payable?

(2.) Is an instrument invalid because post-dated or ante-dated?

Sec. 313. Rules of Construction.

Case No. 440. Uniform Negotiable Instruments Act, Sec. 17.

“Where the language of the instrument is ambiguous, or there are omissions therein the following rules of construction apply:

“1. Where the sum payable is expressed in words and also in figures and there is a discrepancy between the two, the sum denoted by the words is the sum payable; but if the words are ambiguous or uncertain, reference may be had to the figures to fix the amount.

“2. Where the instrument provides for the payment of interest, without specifying the date from which interest is to run, the interest runs from the date of the instrument, and if the instrument is undated, from the issue thereof.

“3. Where the instrument is not dated, it will be considered to be dated as of the time it was issued.

“4. Where there is conflict between the written and printed provisions of the instrument, the written provisions prevail.

“5. Where the instrument is so ambiguous that there is doubt whether it is a bill or a note, the holder may treat it as either, at his election.

“6. Where a signature is so placed upon the instrument that it is not clear in what capacity the person making the same intended to sign, he is to be deemed an indorser.

“7. Where an instrument containing the words ‘I promise to pay’ is signed by two or more persons, they are deemed to be jointly and severally liable thereon.”

Question 440: Recite the 7 rules of construction here set out.

CHAPTER FIFTY-SEVEN

EXECUTION, DELIVERY AND CONSIDERATION

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| § 314. Delivery essential to validity;
presumed when. | § 316. Form of signature; execution
by agent. |
| § 315. Execution in blank. | § 317. Consideration in execution. |

Sec. 314. Delivery Essential to Validity—Presumed When.

Case No. 441. Uniform Negotiable Instruments Act,
Secs. 15, 16.

[Sec. 15.] “Where an incomplete instrument has not been delivered it will not, if completed and negotiated, without authority, be a valid contract in the hands of any holder, as against any person whose signature was placed thereon before delivery.”

[Sec. 16.] “Every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto. As between immediate parties, and as regards a remote party other than a holder in due course, the delivery, in order to be effectual, must be made either by or under the authority of the party making, drawing, accepting or indorsing, as the case may be; and in such case the delivery may be shown to have been conditional or for a special purpose only, and not for the purpose of transferring the property in instrument. But where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him so as to make them liable to him, is conclusively presumed. And where the instrument is no longer in the possession of party whose signature appears

thereon, a valid and intentional delivery by him is presumed until the contrary is proved."

Question 441: What is "delivery" of an instrument? When will delivery be effectual as between immediate parties? When will delivery be conclusively presumed notwithstanding it may have been wanting?

Case No. 442. Mass. Nat. Bank v. Snow, 187 Mass. 159.

Facts: Suit against Snow as endorser of three promissory notes signed H. G. and H. W. Stevens, payable to the order of Snow, endorsed by Snow in blank and discounted before maturity by the Mass. Nat. Bk., the plaintiff. The notes were the notes of one H. W. Stevens, who carried on business as H. G. & H. W. Stevens. Snow introduced evidence to show that after the notes were made, Stevens, the maker, took them from his possession, without Snow's knowledge or consent and sold them to the plaintiff.

Point Involved: Whether a party whose signature appears on an instrument negotiable in form and so made or endorsed as to pass by delivery, may be held liable on such instrument by an innocent holder for value and before maturity who acquired his title from a thief or other party lacking authority to deliver it.

KNOWLTON, C. J.: "This is an action of contract on three promissory notes, signed H. G. and H. W. Stevens, payable to the order of the defendant, indorsed by him in blank and discounted by the plaintiff. They severally bear date December 9, 1899, and the rights of the parties are accordingly governed by the St. 1898, c. 533, sometimes called the negotiable instruments act, which is now embodied in R. L. c. 73, Sections 18 to 212, inclusive.

"* * *

"The notes being indorsed in blank, were payable to bearer within the meaning of the statute. R. L. c. 73, Sec. 26, cl. 5. When the notes were taken to the plaintiff for discount Stevens was the bearer. R. L. c. 73, Sec. 207. The presentation of such notes for discount raised a pre-

sumption of fact that the bearer was the owner of them. *Potte v. Prout*, 3 Gray 502. * * *

“The defendant’s contention that after the notes had been delivered to the defendant and endorsed by him they were stolen by Stevens, brings us to the question whether, under the negotiable instruments act, a holder in due course of a note payable to bearer, that has been stolen, can acquire a good title from the thief. Even before the enactment of the statute, while the decisions were not uniform, the weight of authority was in favor of an affirmative answer to the question. * * *

“The following specific language of the statute touching this question, as well as its provisions in other sections, was intended to establish the law in favor of holders in due course. ‘But where the instrument is in the hands of a holder in due course a valid delivery thereof by all parties prior to him so as to make them liable to him is conclusively presumed.’ R. L. c. 73, Sec. 33. This conclusive presumption exists as well when the note is taken from a thief as in any other case. Of course this rule does not apply to an instrument which is incomplete. But in reference to a complete, negotiable promissory note payable to bearer, it is a wholesome and salutary provision.

* * *

Question 442: (1.) What are the facts in the above case and what do they decide?

(2.) S sued C on a promissory note made by C payable to F and by F endorsed to S. S gave value, purchased the note before it was overdue and had no notice of any defense or irregularity. C defends that he wrote and signed the note merely as a matter of amusement, with no intent to deliver it to F and that F stole it. Is C’s defense good as against S? (*Shipley v. Carroll*, 45 Ill. 285.)

Sec. 315. Execution in Blank.

Case No. 443. Uniform Negotiable Instruments Act, Sec. 14. (See also cases 485 and 486.)

“Where the instrument is wanting in any material particular, the person in possession thereof has a *prima facie*

authority to complete it by filling up the blanks therein. And a signature on a blank paper delivered by the person making the signature in order that the paper may be converted into a negotiable instrument operates as a *prima facie* authority to fill it up as such for any amount. In order, however, that any such instrument when completed may be enforced against any person who became a party thereto prior to its completion, it must be filled up strictly in accordance with the authority given and within a reasonable time. But if any such instrument, after completion, is issued or negotiated to a holder in due course it is valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up strictly in accordance with the authority given and within a reasonable time."

Question 443: State the rule of this section.

Case No. 444. Melton v. Pensacola Bank & Trust Co., 190 Fed. 126.

SANFORD, D. J.: "The fact that the name of the payee was blank at the time the note was signed by the defendants and delivered to Scudamore does not impeach its validity in the hands of the plaintiff. An implied authority was thereby given to Scudamore to fill in the name of the payee, and even if he filled it in with the wrong name, in violation of his agreement with the defendants (as to which there is no evidence in the record) this would not affect the title of the plaintiff, taking the note as holder for value before maturity and without notice. See by analogy, in the case of filling in a blank date, Goodman v. Simonds, *supra*, 20 How. at page 361, 50 L. Ed. 934, and Androscoggin Bank v. Kimball, 10 Cush. (Mass.) 373, and other cases there cited as to the general authority given to fill up blanks, by signing and delivering to an agent of an instrument in which blanks are left."

Question 444: What was the alleged defect in the above note? How did the court dispose of it.

Case No. 445. Louis M. Greeley, "The New Illinois Negotiable Instruments Act," *Illinois Law Review*, Vol. 2, p. 145.

"* * *

"Section 14. This section changes the law as generally laid down in American cases, and conforms to the law as originally established by the English cases and now embodied in the English Bills of Exchange Act (from which the Uniform Negotiable Instruments Law was largely derived). The principle involved can be most quickly shown by an example. The maker of a note payable to A which is blank as to the amount, gives it to A with instructions to fill in and negotiate it for an amount not exceeding \$100. A takes the note to B in its incomplete state and offers to fill it in for \$500 if B will purchase it for that amount. B agrees. A fills in the note for \$500 and indorses it to B who pays the \$500 to A. B has no notice of the maker's instructions to A. A absconds. According to most American cases B would be protected. It is held that A, having lawful possession of the blank note, has ostensible authority to fill in the blank for any amount (in reason), and that a purchaser may rely upon this ostensible authority, where he has no actual notice that the authority has been exceeded. *Huntington v. Branch Bank*, 3 Ala. 186; *Bank of Commonwealth v. Curry*, 2 Dana, 142; *Fullerton v. Sturges*, 4 Ohio St. 529; *Page v. Moerell*, 3 Keyes, 117, and see *City of Chicago v. Gage*, 95 Ill. 593. According to the English cases, B, under the circumstances supposed, having actual knowledge that the instrument was issued blank as to the amount, would not be protected. He would be deemed to take at his peril as to the extent of A's actual authority. *Awde v. Dixon*, 6 Exch. 869; *Hatch v. Searles*, 2 Sm. & Gif. 147; *Hogarth v. Latham*, 3 Q. B. D. 643. As above stated the English rule is the one adopted in Section 14 of our new Act.

"Both English and American cases are agreed that if the note, in the case above supposed, had been filled in before B took it, and B had no notice it was issued in blank, B would be protected. *Merritt v. Boyden*, 191 Ill.

136; *Young v. Ward*, 21 Ill. 223. This principle also finds expression in Section 14."

Question 445: Give the illustration here made by Professor Greeley and state his solution of the question thereby presented.

Sec. 316. Form of Signature—Execution by Agent.
(See cases No. 198 and 199.)

Case No. 446. Uniform Sales Act, Secs. 18-23.

"(Sec. 18.) No person is liable on the instrument whose signature does not appear thereon, except as herein otherwise expressly provided. But one who signs in a trade or assumed name will be liable to the same extent as if he had signed his own name.

"(Sec. 19.) The signature of any party may be made by a duly authorized agent. No particular form of appointment is necessary for this purpose; and the authority of the agent may be established as in other cases of agency.

"(Sec. 20.) Where the instrument contains, or a person adds to his signature, words indicating that he signs for or on behalf on the principal, or in a representative capacity, he is not liable on the instrument if he was duly authorized; but the mere addition of words describing him as agent, or as filling a representative character, without disclosing his principal, does not exempt him from personal liability.

"(Sec. 21.) A signature by 'procuration' operates as notice that the agent has but limited authority to sign, and the principal is bound in case the agent in so signing acted within the actual limits of his authority.

"(Sec. 22.) The indorsement or assignment of the instrument by a corporation or by an infant passes the property therein, notwithstanding that from want of capacity the corporation or infant may incur no liability thereon.

"(Sec. 23.) Where a signature is forged or made without authority it is wholly inoperative, and no right to retain the instrument or to give a discharge therefor or

to enforce payment thereof against any party thereto, can be acquired through or under such signature, unless the party against whom it is sought to enforce such right is precluded from setting up the forgery or want of authority."

Question 446: (1.) A and B compose the "Northwestern Shoe Emporium," a partnership, and make and sign a note which states that the "Northwestern Shoe Emporium promises to pay," etc., and is signed "Northwestern Shoe Emporium, by A." A and B are sued. B defends that his name is not on the note. Are either or both liable (assuming that A had authority to sign for B)? (If the Northwestern Shoe Emporium had been a corporation and A and B stockholders could A and B be sued personally on the note?)

(2.) What is the effect of a signature "by procuration"?

Sec. 317. Consideration in Execution.

Case No. 447. Uniform Negotiable Instruments Act, Secs. 24-29.

"(Sec. 24.) Every negotiable instrument is deemed *prima facie* to have been issued for a valuable consideration, and every person whose signature appears thereon to have become a party thereto for value.

"(Sec. 25.) Value is any consideration sufficient to support a simple contract.

"2. An antecedent or pre-existing debt constitutes value and is deemed such, whether the instrument is payable on demand or at a future time.

"(Sec. 26.) Where value has at any time been given for the instrument, the holder is deemed a holder for value in respect to all parties who became such prior to that time.

"(Sec. 27.) Whether the holder has a lien on the instrument, arising either from contract or by implication of law, he is deemed a holder for value to the extent of his lien.

"(Sec. 28.) Absence or failure of consideration is a matter of defense as against any person not a holder in

due course, and partial failure of consideration is a defense *pro tanto*, whether the failure is an ascertained and liquidated amount or otherwise.

“(Sec. 29.) An accommodation party is one who has signed the instrument as maker, drawer, acceptor, or indorser, for the purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party.”

Question 447: (1.) A sues B on a negotiable promissory note for \$1,000 given by B to A's order. He presents in evidence the note, proves its execution and delivery by B, and then rests his case. B then moves the court to non-suit A on the ground that A has not made a case as he has not proved any consideration. Is this contention good?

(2.) Suppose in fact there was no consideration. Can B plead and prove this to defeat the suit?

(3.) Suppose there was in fact no consideration but the note had been sold by the payee to C, a holder in due course. Can the defense be made by B against C?

(4.) What is meant by the statement that an antecedent debt is value?

(5.) A desires to borrow \$500 from B. B is willing to loan the money but is unsatisfied with A's financial standing, whereupon A gets M to make a note to him, which A then indorses to B. M signs this note as a mere matter of friendship in order to enable B to get the money. B knows that M gets nothing for his act. A defaults, and B sues M. M pleads lack of consideration and knowledge thereof by B when A transferred the paper to him. Is the defense good? Why is this not a case of lack of consideration? What is M called?

PART XV

NEGOTIATION, RIGHTS AND LIABILITIES

Chapter Fifty-eight.	Negotiation.
Chapter Fifty-nine.	Holder in Due Course, Who is.
Chapter Sixty.	Defenses Not Available Against Holder in Due Course.
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CHAPTER FIFTY-EIGHT

NEGOTIATION

§ 318. Meaning of negotiation.	§ 323. Indorsement to or by fiscal officer.
§ 319. Manner of indorsement.	§ 324. General rules and presump- tions as to indorsement.
§ 320. Partial indorsement.	
§ 321. Kinds of indorsement.	
§ 322. Indorsement where several payees.	

Sec. 318. Meaning of Negotiation.

Case No. 448. Uniform Negotiable Instruments Act,
Sec. 30.

“An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof; if payable to bearer, it is negotiated by delivery; if payable to order, it is negotiated by the indorsement of the holder, completed by delivery.”

Question 448: When is an instrument negotiated? If payable to bearer, how may it be negotiated? (When is an instrument payable to bearer?) If payable to order, how may it be negotiated?

Sec. 319. Manner of Indorsement.

Case No. 449. Uniform Negotiable Instruments Act, Sec. 31.

“The indorsement must be written on the instrument itself or upon a paper attached thereto. The signature of the indorser, without additional words, is a sufficient indorsement.”

Question 449: (1.) A wrote a letter to B enclosing an undorsed promissory note, not payable to bearer. In the letter, he stated that he thereby transferred and indorsed the instrument to B. B sent the instrument back for indorsement but before it was indorsed B learned of the fraud by which A had obtained the note from the maker. Was the negotiation to B complete before he learned of the fraud? Was B subject to the defense? Why?

(2.) May an indorsement ever be made elsewhere than on the paper itself? When? (See also case 458.)

Case No. 450. *Markey v. Corey*, 108 Mich. 184, 36 L. R. A. 117.

Facts: Markey, as indorsee, sues Corey, as indorser, of a note transferred to him by the following writing on the back thereof, signed by Corey:

“I hereby assign the within note to Matthew M. Markey.”

Defense that Markey is not an indorsee, and cannot sue in his own name as such, and that the alleged indorser, the defendant, assumed no liability as endorser within the rules governing commercial paper.

Point Involved: Whether a transfer of a note on the back thereof in the language “I hereby assign” is an endorsement.

LONG, J.: “* * *

“The usual mode of transfer of a promissory note is by simply writing the indorser’s name upon the back, or by writing also over it the direction to pay the indorsee named, or order, or to him or bearer. An indorsement, however, may be made in more enlarged terms, and the indorser be held liable as such. In *Sands v. Wood*, 1 Iowa, 263, the indorsement was, ‘I assign the within note to Mrs. Sarah Coffin.’ In *Sears v. Lantz*, 47 Iowa, 658, the indorsement on the note was, ‘I hereby assign all my right and title to Louis Meckley.’ And in each case the party so assigning was held as indorser, the Court in the latter case saying of *Sands v. Wood*: ‘He used no words that, in and of themselves, indicated that he had bound or made himself liable in case the maker, after demand, failed to pay the note. But it was held the law, as a legal conclusion, attached to the words used the liability that follows the indorsement of a promissory note.’ See, also, *Duffy’s Adm’r v. O’Connor*, 7 Baxt. 498; *Shelby v. Judd*, 24 Kan. 166; *Brotherton v. Street*, 124 Ind. 599.

“The language used in the assignment to the note in suit does not negative the implication of the legal liability of the assignor as indorser, and as the words are to be construed, as strongly as their sense will allow, against the assignor, he must be held as indorser. This rule is fully supported in *Hatch v. Barrett*, 34 Kan. 230. See, also, *Adams v. Blethen*, 66 Me. 19.

“It must be held, therefore, that the memorandum on the note did not relieve Corey from his liability as indorser.

“The Court was not in error in admitting the contract in evidence, as its purpose was to show that the note was not in fact limited by its provisions, and those provisions of the contract cited did not destroy the negotiability of the note. (Daniel Neg. Inst., § 48.)—*The judgment must be affirmed.*”

The other justices concurred.

Question 450: State the point involved and the court’s decision.

(Note: There is a conflict of authority in this point, although the weight of authority seems to be with the above case. See *Spencer v. Halpern*, 62 Ark. 595, 36 L. R. A. 130 *contra*.)

Case No. 451. *Leavitt v. Putnam*, 3 N. Y. 494.

HURLBUT, J.: “* * *

“The note in the present case was upon its face transferable, and its character in respect to negotiability could only have been changed by an indorsement containing express words of restriction. The defendants’ indorsement was a full one, containing the name of the person in whose favor it was made, but omitting the words ‘or order,’ the legal effect of which was, nevertheless, to make the note payable to him or his order, and his endorsement therefore was effectual to transfer the note to the plaintiff. (Chitty on Bills, 136; Story on Prom. Notes, § 139.)

“I am of opinion that the judgment of the superior court should be reversed, and a new trial awarded.—*Judgment reversed.*”

Question 451: If the note is negotiable on its face, must the endorsement contain the word “to order”? If it omit such words, is the negotiation restricted to the immediate indorsee; or can it be further negotiated?

Sec. 320. Partial Indorsement.

Case No. 452. Uniform Negotiable Instruments Act, Sec. 32.

“The indorsement must be an indorsement of the entire instrument. An indorsement which purports to transfer to the indorsee a part only of the amount payable, or which purports to transfer the instrument to two or more indorsees severally, does not operate as a negotiation of the instrument. But where the instrument has been paid in part, it may be indorsed as to the residue.”

Question 452: State the rule as here stated? If a part of the sum in the instrument has been paid, can the instrument be indorsed as to the residue?

Sec. 321. Kinds of Indorsement.

Case No. 453. Uniform Negotiable Instruments Act, Secs. 33 to 40.

“(Sec. 33.) An indorsement may be either in blank or special; and it may also be either restrictive or qualified, or conditional.

“(Sec. 34.) A special indorsement specifies the person to whom or to whose order the instrument is to be payable; and the indorsement of such indorsee is necessary to the further negotiation of the instrument. An indorsement in blank specifies no indorsee, and an instrument so indorsed is payable to bearer, and may be negotiated by delivery.

“(Sec. 35.) The holder may convert a blank indorsement into a special indorsement by writing over the signature of the indorser in blank any contract consistent with the character of the indorsement.

“(Sec. 36.) An indorsement is restrictive which either:

“1. Prohibits the further negotiation of the instrument; or

“2. Constitutes the indorsee the agent of the indorser; or

“3. Vests the title in the indorsee in trust for or to the use of some other person. But the mere absence of words implying power to negotiate does not make an indorsement restrictive.

“(Sec. 37.) A restrictive indorsement confers upon the indorsee the right:

“1. To receive payment of the instrument.

“2. To bring any action thereon that the indorser could bring.

“3. To transfer his rights as such indorsee where the form of the indorsement authorizes him to do so.

“But all subsequent indorsees acquire only the title of the first indorsee under the restrictive indorsement.

“(Sec. 38.) A qualified indorsement constitutes the indorser a mere assignor of the title to the instrument. It

may be made by adding to the indorser's signature the words 'without recourse' or any words of similar import. Such an indorsement does not impair the negotiable character of the instrument.

“(Sec. 39.) Where an indorsement is conditional, a party required to pay the instrument may disregard the condition, and make a payment to the indorsee or his transferee, whether the condition has been fulfilled or not. But any person to whom an instrument so indorsed is negotiated, will hold the same, or the proceeds thereof, subject to the rights of the person indorsing conditionally.

“(Sec. 40.) Where an instrument originally payable to or indorsed specifically to bearer is subsequently indorsed specially it may nevertheless be further negotiated by delivery; but the person indorsing specially is liable as indorser to only such holders as make title through his indorsement.”

Question 453: (1.) Define: special indorsement; blank indorsement; restrictive indorsement; qualified indorsement; conditional indorsement.

(2.) How may a blank indorsement be changed? What effect would this have on the manner of further indorsement?

(3.) What right has one to whom an instrument has been restrictively indorsed?

(4.) What is a qualified indorsement? Does such indorsement restrict further transfer?

(5.) What is a conditional indorsement? Does it restrict further transfer? Who may disregard the condition?

Sec. 322. Indorsement Where Several Payees.

Case No. 454. Uniform Negotiable Instruments Act, Sec. 41.

“Where an instrument is payable to the order of two or more payees or indorsees who are not partners, all must indorse unless the one indorsing has authority to indorse for the others.”

Question 454: State this provision.

Sec. 323. Instrument Drawn or Indorsed to "Cashier."

(Negotiable Instruments Act, Sec. 42.)

Case No. 455. First Nat. Bk. v. McCullough, 50 Ore. 508, 17 L. R. A. (N. S.) 1105.

Facts: Suit by the bank on two notes. The bank claims as indorsee under the following indorsement: "Pay A. B. Nixon, or order, waiving demand and notice of protest. H. L. Moody." Dixon was in fact cashier of the bank. The bank claims that as the note was payable to its cashier, it can sue thereon.

Point Involved: Whether an indorsement to a cashier in fact, if not stated to be cashier, may be considered indorsement to the bank, if that was the intention.

MOORE, J.: "* * * The rule to be extracted from these decisions has been embodied in our statute known as the 'uniform negotiable instruments law' as follows: 'Where an instrument is drawn or endorsed to a person as "cashier" or other fiscal officer of a bank or corporation, it is deemed *prima facie* to be payable to the bank or corporation of which he is such officer, and may be negotiated by either the indorsement of the bank or corporation or the indorsement of the officer.' * * * The clause just quoted and the decisions adverted to are undoubtedly based on the theory that the employment of the qualifying word 'cashier' or other designation of a fiscal office, appended to the name of a payee or indorsee of commercial paper, creates an ambiguity as to the real party intended, to explain which parol evidence is admissible to show who is the principal for whose benefit such agent received or accepted the promise to pay a stipulated sum of money. In the case at bar, however, no official designation is added to Nixon's name and hence no uncertainty is apparent * * * and parol evidence is inadmissible to control or vary the terms of the writing. * * *"

Question 455: State the facts, the question presented and the Court's ruling in the above case.

Sec. 324. General Rules and Presumptions as to Indorsement.

Case No. 456. Uniform Negotiable Instruments Act, Secs. 43 to 50.

“(Sec. 43.) Where the name of the payee or indorsee is wrongly designated or misspelled, he may indorse the instrument as therein described, adding, if he think fit, his proper signature.

“(Sec. 44.) Where any person is under obligation to indorse in a representative capacity, he may indorse in such terms as to negative personal liability.

“(Sec. 45.) Except where an indorsement bears date after the maturity of the instrument, every negotiation is deemed *prima facie* to have been effected before the instrument was overdue.

“(Sec. 46.) Except where the contrary appears, every indorsement is presumed *prima facie* to have been made at the place where the instrument is dated.

“(Sec. 47.) An instrument negotiable in its origin continues to be negotiable until it has been restrictively indorsed or discharged by payment or otherwise.

“(Sec. 48.) The owner may at any time strike out any indorsement which is not necessary to his title. The indorser whose indorsement is struck out, and all indorsers subsequent to him, are thereby relieved from liability on the instrument.

“(Sec. 49.) Where the holder of an instrument payable to his order transfers it for value without indorsing it, the transferrer vests in the transferee such title as the transferee had therein, and the transferee acquires, in addition, the right to have the indorsement of the transferrer. But for the purpose of determining whether the transferee is a holder in due course, the negotiation takes effect as of the time when the indorsement is actually made.

“(Sec. 50.) Where an instrument is negotiated back to a prior party, such party may, subject to the provisions of this Act, reissue and further negotiate the same, but

he is not entitled to enforce payment thereof against any intervening party to whom he was personally liable.”

Question 456: (1.) A intends to make a check to Albert Norton, but being mistaken as to A’s name, the instrument is made payable to Alfred Norwood. How can or must Norton indorse this check?

(2.) A check is made payable to James Owen, an administrator, how may Owen indorse to escape personal liability?

(3.) What is the presumption as to when an undated negotiation was made with respect to maturity.

(4.) What is the presumption as to place of indorsement?

(5.) How long does an instrument continue to be negotiable?

(6.) What is the right to strike out indorsements?

(7.) See cases 457 and 458 and the questions thereto.

(8.) What right of negotiation has one who acquires an instrument on which he was a prior party?

CHAPTER FIFTY-NINE

HOLDER IN DUE COURSE—WHO IS

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| § 325. Importance of question. | § 329. Purchaser for value. |
| § 326. Indorsement necessary (where
paper not payable to
bearer). | § 330. In good faith. |
| § 327. Instrument complete and
regular. | § 331. Purchaser from holder in due
course. |
| § 328. Instrument not over due. | § 332. Amount recoverable by hold-
er in due course. |

Sec. 325. Importance of the Question.

(Note: It is important to appreciate what is connoted by the term "holder in due course.")

In the first place we should notice that one may acquire by negotiation a good title to negotiable paper who is *not* a holder in due course. That is, a negotiable instrument may be the subject of a gift (there being consideration in its inception between the original parties) and may be transferred *after* it is mature. We consider whether one is a holder in due course in order to ascertain whether such holder is subject to the "equities" or defenses to which the party from whom he acquired the paper would have been subject. If there are no such equities or defenses to be raised, the holder may recover although he cannot qualify as a holder in due course.)

Sec. 326. Indorsement Necessary (Except Where Instrument Payable to Bearer).

Case No. 457. Goshen Bank v. Bingham, 118 N. Y. 349.

Facts: The bank gave a check to Brown, who acquired it by fraud. He transferred it in due course to Bingham & Co. except the indorsement of the check (it not being

payable to bearer) was overlooked. Before the indorsement was procured, Bingham & Co. had notice of the fraud.

Point Involved: Whether one who acquires an instrument which cannot be negotiated by delivery, without the indorsement thereof is a holder in due course and subject to all defenses of which he has notice prior to such indorsement.

PARKER, J.: "As against Brown, to whose order the check was payable, the bank had a good defense. But it could not defeat a recovery by a *bona fide* holder to whom the check had been indorsed for value. By an oversight on the part of both Brown and Bingham & Co. the check was accepted and cashed without the indorsement of the payee. Before the authority to indorse the name of the payee upon the check was procured and its subsequent indorsement thereon, Bingham & Co. had notice of the fraud which constituted a defense for the bank as against Brown. Can the recovery had be sustained?

"It is too well settled by authority, both in England and in this country, to permit of questioning, that a purchaser of a draft, or check, who obtains title without an indorsement by the payee, holds it subject to all equities and defenses existing between the original parties, even though he has paid full consideration, without notice of the existence of such equities and defenses. Harrop v. Fisher, 30 L. J. 283; Whistler v. Forster, 14 C. B. (N. S.) 246; Savage v. King, 17 Me. 301; Clark v. Callison, 7 Ill. 263; Haskell v. Mitchell, 53 Me. 468; Clark v. Whittaker, 50 N. H. 474; Calder v. Billington, 15 Me. 398; Lancaster Nat. Bk. v. Taylor, 100 Mass. 18; Gilbert v. Sharp, 2 Lans. 412; Hedges v. Sealy, 9 Barb. 214-218; Franklin Bank. v. Raymond, 3 Wend. 69; Raynor v. Hoagland, 7 J. & S. 11; Muller v. Pondir, 55 N. Y. 325; Freund v. Importers & Traders Bk., 76 Id. 352; Trust Co. v. Nat. Bank, 101 U. S. 68; Osgood v. Artt, 17 Fed. Rep. 575.

"The reasoning on which this doctrine is founded may be briefly stated as follows: The general rule is that no

one can transfer a better title than he possesses. An exception arises out of the rule of the law-merchant, as to negotiable instruments. It is founded on the commercial policy of sustaining the credit of commercial paper, being treated as currency in commercial transactions, such instruments are subject to the same rule as money. If transferred by indorsement, for value, in good faith and before maturity, they become available in the hands of the holder, notwithstanding the existence of equities, and defenses, which would have rendered them unavailable in the hands of a prior holder.

“This rule is only applicable to negotiable instruments which are negotiated according to the law-merchant.

“When, as in this case, such an instrument is transferred but without an indorsement, it is treated as a chose in action assigned to the purchaser. The assignee acquires all the title of the assignor and may maintain an action thereon in his own name. And like other choses in action it is subject to all the equities and defenses existing in favor of the maker or acceptor against the previous holder.

“Prior to the indorsement of this check, therefore, Bingham & Co. were subject to the defense existing in favor of the bank as against Brown, the payee.

“Evidence of an intention on the part of the payee to indorse does not aid the plaintiff. It is the act of indorsement, not the intention, which negotiates the instrument, and it cannot be said that the intent constitutes the act.

“The effect of the indorsement made after notice to Bingham & Co. of the bank’s defense must now be considered. Did it relate back to the time of the transfer, so as to constitute the plaintiffs holders by indorsement as of that time?

“While the referee finds that it was intended both by Brown and the plaintiffs that the check should be indorsed, and it was supposed that he had so indorsed it, he also finds that Brown made no statement to the effect that the check was indorsed; neither did the defendants request Brown to indorse it. There was,

therefore, no agreement to indorse. Nothing whatever was said upon the subject. Before Brown did agree to indorse the plaintiffs had notice of the bank's defense. Indeed, it had commenced an action to recover possession of the check.

"It would seem, therefore, that having taken title by assignment, for such was the legal effect of the transaction, by reason of which the defense of the bank against Brown became effectual as a defense against a recovery on the check in the hands of the plaintiffs as well, that Brown, and Bingham & Co., could not, by any subsequent agreement or act, so change the legal character of the transfer as to affect the equities and rights which had accrued to the bank. That the subsequent act of indorsement could not relate back so as to destroy the intervening rights and remedies of a third party.

"This position is supported by authority. Harrop v. Fisher; Whistler v. Forster; Savage v. King; Haskell v. Mitchell; Clark v. Whitaker; Clark v. Callison; Lancaster Nat. Bank v. Taylor; Gilbert v. Sharp, cited, *supra*."

Question 457: (1.) What were the facts, the question presented and the Court's decision in the above case?

(2.) What did the court give as the reason for the doctrine?

Case No. 458. Osgood's Adm'rs v. Artt, 17 Fed. 575.

Facts: May 14, 1856, Artt, executed and delivered to R. & M. Rwy. Co. his note, payable to the Company or its order, for \$2,500, in five years from May 10, 1856, with interest, etc. As security therefore, he executed a mortgage on real estate in Carroll County, Wisconsin. Afterwards the R. Co. made its bond dated June 10, 1856, acknowledging indebtedness to and promising to pay Charles Osgood or bearer \$2,500, May 10, 1861, with interest, etc., which contained a provision that to better secure said bond the company "have assigned and transferred, and by these presents do assign and transfer" to the holder of the bond, the said note signed by Artt, together with the mortgage on said real estate. The

Artt note, the bond and the mortgage were attached together with eyelets. When these papers were delivered to Osgood, there was no indorsement of the note, which though afterwards secured in these words, "Racine & Mississippi Railroad Company, by H. S. Durand, President," was not placed on said note until after Osgood had learned that the note had been secured from Artt by fraud, and that also there had been a failure of consideration. Artt, contending that Osgood is not a holder in due course, seeks to set up these defenses against him. Osgood did not know of the defenses when he purchased and received the notes, but learned of them before he secured the indorsement.

Point Involved: As in the above case, with the additional question as to what constitutes an indorsement.

HARLAN, J.: "1. It is a settled doctrine of the law-merchant that the *bona fide* purchaser for value of negotiable paper, payable to order, if it be indorsed by the payee, takes the legal title unaffected by any equities which the payor may have as against the payee.

"2. But it is equally well settled that the purchaser, if the paper be delivered to him without indorsement, takes, by the law-merchant only the rights which the payee has, and therefore takes subject to any defense the payor might rightfully assert as against the payee. The purchaser in such case becomes only the equitable owner of the claim or debt evidenced by the negotiable security, and, in the absence of defense by the payor, may demand and receive the amount due and, if not paid, sue for its recovery, in the name of the payee, or in his own name, when so authorized by the local law.

"3. As a general rule the legal title to negotiable paper, payable to order, passes, according to the law-merchant, only by the payee's indorsement on the security itself. The only established exception to this rule is where the indorsement is made on a piece of paper, so attached to the original instrument as, in effect, to become part thereof, or be incorporated into it. This addition

is called, in the adjudged cases and elementary treatises, an allonge. That device had its origin in cases where the back of the instrument had been covered with indorsements, or writing, leaving no room for further indorsements thereon. But, perhaps, an indorsement upon a piece of paper, attached in the manner indicated, would now be deemed sufficient to pass the legal title, although there may have been, in fact, room for it on the original instrument.

“4. But neither the general doctrines of commercial law, nor any established exception thereto, make words of mere assignment and transfer of such paper—contained in a separate instrument, executed for a wholly different and distinct purpose—equivalent to an indorsement within the rule, which admits the payor to urge, as against the holder of an unindorsed negotiable security, payable to order, any valid defense which he has against the original payee.

“5. The transfer of the note in suit, by words of assignment in the body of the railroad company’s bond, did not, in the judgment of the Court, amount to an indorsement of the note, although the bond, note and mortgage were originally fastened together by eyelets. The facts set out in the third plea, and sustained by the special finding, constitute, therefore, a complete defense to the action, unless, as contended by plaintiffs, the subsequent indorsement, in form, by the railroad company, after Osgood was informed of Artt’s defense, has relation back to the time when the former, without notice of such defense, purchased the note for value then paid.

* * *

“I am of the opinion that the facts which came to Osgood’s knowledge prior to the indorsement, and which, in substance, constitute the defense set out in the third plea, furnished notice that the company had, by reason of fraud and failure of consideration, lost its right to demand payment of the note from Artt. By the indorsement, after such notice, Osgood could not acquire any greater rights than the company possessed. He did not

become the holder of the note by indorsement, as required by the law-merchant, until after he had notice that the company could not rightfully pass the legal title, so as to defeat Artt's defense.

"While the adjudged cases are not in harmony upon some of these propositions, the conclusions indicated are, in the opinion of the Court, consistent with sound reason, and are sustained by the great weight of authority."

Question 458: State the facts, the question presented and the Court's decision in this case.

(2.) What is an "allonge"?

Sec. 327. The Instrument Must Be Complete and Regular.

Case No. 459. Elias v. Whitney, 98 N. Y. Supp. 667.

TRUAK, J.: "The evidence showed that the check in suit had been changed before it reached the plaintiff, and that a mere inspection of the check showed such change. There is no evidence showing that the defendant authorized or assented to the alteration, but the appellant says that he is 'a holder in due course,' and not a party to the alteration, and that under Sec. 205 of the Negotiable Instruments Law (Laws, 1897) p. 745 (c. 612), he may enforce the payment of the check, according to its original tenor. Sec. 91, p. 732, of the Negotiable Instruments Law, states what constitutes a holder in due course. According to that section, a holder in due course is a holder who has taken an instrument that is complete and regular on its face. This instrument was not complete and regular on its face at the time the defendant took it. As we have stated before, a mere inspection of the instrument showed its defect, and, therefore, under subdivision 41 of the negotiable instruments law, plaintiff had notice of an infirmity in the instrument at the time he took it."

Question 459: State the facts of this case and the Court's decision.

Sec. 328. One Is Not a Holder in Due Course Unless Instrument Acquired Before Overdue.

Case No. 460. Fisher v. Leland et al., 58 Mass. 456.

SHAW, C. J.: “* * * But where a negotiable note is found in circulation after it is due, it carries suspicion on the face of it. The question instantly arises, why is it in circulation,—why is it not paid? Here is something wrong. Therefore, although it does not give the indorser notice of any specific matter of defense, such as set-off, payment, or fraudulent acquisition, yet it puts him on inquiry; he takes only such title as the indorsee himself has, and subject to any defense which would be made, if the suit were brought by the indorser. The note does not cease to be negotiable; the indorsee takes title, and may sue, but he is so far in privity with his indorser that he takes only his title; and if the defendant could make any defense against suit brought by such indorser, he can make it against the indorsee. * * *”

Question 460: (1.) Why does the purchaser of an overdue note take it subject to the defenses?

(2.) Is an overdue note still negotiable?

Case No. 461. Wilkins v. Usher, 123 Kentucky, 696.

Facts: Suit by an indorsee of a note reading: “One day after date, we promise to pay,” etc., and which the indorsee purchased on the day after its date.

Defense: That the note was secured by the payee (indorser to plaintiff) by fraud.

Point Involved: Whether a negotiable instrument purchased on the day of its maturity is acquired in due course.

HOBSON, C. J.: “* * * The note was dated September 21st. It was payable one day after date, on September 22, but it was not overdue at any time on the 22nd. Sec. 52 provides among other things that the purchaser of a note before it is overdue may be a holder for

value. Usher's purchase was made before the note was overdue. * * *

Question 461: State the rule of this case.

Case No. 462. *Mitchel v. Catchings*, 23 Fed. 710.

Facts: See the opinion.

Point Involved: When a demand note is to be considered as overdue from the standpoint of one who claims to purchase in due course.

BREWER, J. (orally): "In *Mitchell v. Catchings*, action on a note for \$5,000, there is really only one question, and that is, whether the plaintiff was a *bona fide* holder, before due, of the note in controversy. In its inception the note was a note given as security for option deals—a pure gambling transaction—a note void as between the parties beyond any question. The plaintiff claims to be a *bona fide* holder before due. The note is a demand note, dated November 13th, indorsed to plaintiff, December 6th. No demand was in fact made prior to transfer. While it is true, a letter was written by McCormick, of the firm of Smith, McCormick & Co., the payees of the note, yet there was no presentment of the paper to the maker, no demand within the rules of the law-merchant. Twenty-three days elapsed between the making of the paper and the transfer. Is that such length of time that the Court is justified in presuming a demand, and holding that the paper was taken overdue? The books show it is a mixed question of law and fact as to what is a reasonable time within which payment must be made. In *Daniel, Negotiable Instruments*, quoting, I think, from *Paron's Notes and Bills*, the author makes use of an expression somewhat like this:

"'That it is unquestionable that one day would not be a reasonable time, and that five years would be an unreasonable delay. Intermediate these times there is nothing settled, and each case must be left to be determined upon its own peculiar circumstances.'

"This note was given as security for a continuing transaction. In the contemplation of the parties, it was not to be immediately paid. * * * Hence, as between the parties, it being contemplated that it was to stand as security for a continuing transaction, and not as paper which was to be immediately collected and paid, it does not seem to me that 23 days can be held to be an unreasonable time. Counsel said in the argument (I do not know whether correctly or not, for I have not had time to examine) that no case can be found in the books in which any period less than thirty days has been held to be an unreasonable time. Applying the law as thus laid down in the books, I cannot hold that the note was transferred after due. * * *"

Question 462: (1.) What was the time this note had been outstanding? Was it overdue?

(2.) Suppose a demand had actually been made one day after the note was given, but this was unknown to the purchaser, would the note be overdue as to him?

Case No. 463. *Paine v. Central Vermont R. Co.*, 14 Federal, 269.

Facts: Plaintiff bought the demand note sued on within 3 and 4 months after its date. There was nothing due on the note when he bought it.

Point Involved: When a demand note is to be considered overdue.

WHEELER, D. J.: " * * *

" * * * As the note was on demand, it was due presently. It would have to be presented and paid according to the usual course of business, if free from defenses. The time would come when, if outstanding, the presumption would be that it had been demanded, or that a demand had been omitted because known to be unavailing. If this time was such as to make it reasonable to suppose that the note was outstanding because it would not be paid, then the plaintiff was in fault in taking it without inquiring of the maker. Whether the lapse

of time was such is a question of law. On this question the authorities are not uniform, but no case shows that more than three months can reasonably be overlooked. Business paper would usually be adjusted within that time, if regular. In this case the circumstance that the holder of the note was borrowing on disadvantageous terms, would lead directly to the inquiry why he did not resort to the maker of the note when it was due on demand. Had the plaintiff inquired, the presumption is that he would have learned the truth, and both would have been saved from loss. As he did not inquire, it seems more just, as well as lawful, that he should take the risk brought about by the failure to inquire, than that the defendant should.

“* * *

“The plaintiff must stand upon his rights acquired by taking the note at the time and under the circumstances when he took it. The note was at that time overdue, and he took it with the same obligation that it carried in the hands of the person whom he took it of. This principle that overdue paper is taken subject to all defenses is so well settled in the law as to require no citation of authorities to support it.”

Question 463: State the facts in this case, and the Court's reasoning.

Case No. 464. Kelley v. Whitney, 45 Wisconsin, 110.

Facts: Suit on note acquired by plaintiff as indorsee before overdue, but at a time when interest was overdue and unpaid. Defendants claim payment to the payee prior to the indorsement. The question presented is whether the note is to be considered as overdue within the rule making the purchaser of an overdue instrument subject to defenses.

Point Involved: Is a note to be considered as overdue to affect a purchaser with the equities thereof from the fact that interest thereon is overdue and unpaid.

COLE, J.: "Can the plaintiff, under the circumstances, claim the protection which the law affords a *bona fide* purchaser of commercial paper for value, before maturity? [Here the Court reviews certain former Wisconsin decisions] * * * we deem it our duty to adhere to the rule, that a purchaser for value of unmatured, commercial paper, with interest overdue, is not, from that fact alone, affected with notice of prior equities or infirmities in the title."

Question 464: State the facts, the question presented and the Court's decision in this case.

Case No. 465. Vinton v. King, 86 Mass. 562.

Facts: Action on a note dated April 26, 1858, as follows:

"Two years after date, by installments of \$53 in every six months after this date, until fully paid, I promise to pay Peter Bruyett, or bearer, the sum of two hundred and twelve dollars with interest in manner above stated.
"John King."

This note was acquired by the plaintiff about three months after the first installment was overdue and unpaid.

Defense: That the note was acquired by the payee by duress.

Point Involved: Whether a note payable in installments is to be considered as overdue so as to subject a purchaser to the defenses against his transferror, from the fact that one of the installments is overdue and unpaid.

METCALF, J.: "* * * it being admitted law, that he who takes a note after it is due takes it subject to all objections and equities to which it was liable in the hands of him from whom he takes it, and to the same defenses, in a suit against the maker, which the maker might set up in an action against him by the payee; that the circumstances that a note is overdue makes it incumbent on the party receiving it to satisfy himself that it is a good one,

and that if he omit so to do, he must stand in the situation of him who was holder at the time it was due. * * *

But the ground assumed by the plaintiff is, that in this case the note had not, within the rule of law on this subject, come to maturity, and was not overdue and dishonored before it was transferred to him, because the time for payment of the last three installments had not then come. The ground is not maintainable. As to the first installment of \$53 in six months, and interest on \$212, the note had come to maturity and was overdue and dishonored when the plaintiff took it; and as to the amount of that installment, it is not to be doubted that the defendant may make the same defense against the plaintiff, which he might have made against the payee. And we are of the opinion that he may make the same defense to the whole note. The note is a single contract to pay \$212 in four half-yearly installments, and the plaintiff took it with notice on its face that, as to the first installment, the defendant might have a justifiable cause for withholding payment, whatever that cause might be; whether a cause which affected that installment only—as a release thereof by the payee, or a legal set-off against him to the amount thereof—or a cause which, between him and the payee, vitiated the whole note, as want or failure of consideration, unlawful consideration, fraud or duress. And if the payee had sued for the recovery of the first installment, before the second was made payable, the defendant might have defeated the action, by showing that the note was wholly void and a judgment for him, on such ground of defense, would have been conclusive against the maintenance, by the payee, of a subsequent action to recover the other installments. *Black River Savings Bank v. Edwards*, 10 Gray, 387.”

Question 465: State the facts, the question presented and the Court's decision in this case.

Case No. 466. *Gillette v. Hodge*, 170 Federal, 313.

Facts: See the opinion.

Point Involved: Whether a note which provides that if interest is not paid when due the whole note shall become due is to be considered as overdue, so as to affect a purchaser, from the fact that the interest is overdue and unpaid.

AMIDON, D. J.: "This was an action brought by Hodge Bros., the defendants in error, against the plaintiffs in error, on three promissory notes, dated April 13, 1903, payable to Robert Burgess & Son, or order, respectively, July 1, 1904, 1905 and 1906, with interest payable annually. The notes contained a provision that default in the payment of interest should cause the whole note to become immediately due. The plaintiffs are private bankers, who discounted the notes at the rate of 10 per cent. on June 2, 1904, passing the proceeds to the credit of the payees, who afterwards drew the same in full. The answer interposes two defenses: First, that the notes were given as the purchase price of a stallion, and that the horse failed to comply with the warranties made by the vendors; second, that the notes were handed to the payees by the defendants upon an express agreement that they should not be treated as delivered until the signature of four other persons named in the answer should be obtained, and that, unless such signatures should be obtained, the notes should be of no effect. To make these defenses available, the defendants first sought to show that the notes were dishonored at the time they were acquired by the plaintiffs. Their main reliance for establishing this fact is the provision in the notes that they should become immediately due if there was default in the payment of interest. The first year's interest was due April 13, 1904. This installment of interest was, therefore, past due on June 2d, when plaintiffs acquired the notes; and it is urged that this fact, when combined with the clause of the note just referred to, caused the notes to mature April 13th and that they were, therefore, dishonored at the time of the indorsement. The difficulty with this contention is that the provision of the notes upon

which it is based is not self-executory. It simply gave to the holder an option to declare the notes due for default in the payment of interest. There is some conflict in judicial decisions as to the effect of such a provision (*Hodge Bros. v. Wallace*, 129 Wis. 84, 108 N. W. 212, 116 Am. St. Rep. 938); but it was expressly ruled by the Supreme Court of the United States in the case of *Chicago Railroad Equipment Co. v. Merchants' National Bank*, 136 U. S. 268, 10 Sup. Ct. 999, 34 L. Ed. 349, that a similar provision did not of itself cause the notes to mature upon default in the payment of interest. See, also, *Keene Five Cent Savings Bank v. Reid*, 123 Fed. 221, 224, 59 C. C. A. 225; *Crissey v. Morrill*, 125 Fed. 878, 884, 60 C. C. A. 460. There being no statute in the state of Minnesota, where the notes were given and payable, affecting the subject, the decision of the Supreme Court is controlling in federal courts, as the question relates to a matter of general commercial law.

“An effort was also made at the trial to prove the agreement relating to the conditional delivery of the notes. Defendants, however, did not offer to prove that the plaintiffs had any notice of this agreement at the time they became indorsees of the paper, and for this reason the evidence was excluded. As between the original parties the agreement would have constituted a valid defense. *Burke v. Dulaney*, 153 U. S. 228, 14 Sup. Ct. 816, 38 L. Ed. 698. But it could not be available as against an indorsee in good faith. Signers of negotiable paper cannot place it in the hands of the payee conditionally so as to affect subsequent *bona fide* holders. This is now elementary law. 1 *Randolph on Commercial Paper*, 411; *Daniel on Negotiable Instruments*, 68. The conditional agreement gave rise to mere ‘equity,’ which was cut off by transfer of the paper to party taking without notice. *Chase National Bank v. Faurot*, 149 N. Y. 532, 44 N. E. 164, 35 L. R. A. 605; *Cooper v. Merchants' & Manufacturers' National Bank*, 25 Ind. App. 341, 57 N. E. 569; *First National Bank of Freeport v. Comp-Board Mfg. Co.*, 61 Minn. 274, 63 N. W. 731.

“On quite elementary principles, the judgment in this case was right, and should be affirmed.”

Question 466: What was the question presented and on what reasoning did the Court hold the note was not overdue?

Sec. 329. One Is Not a Holder in Due Course Unless He Gives Value Before the Note Is Overdue and Before He Receives Notice.

(Note: As to inadequacy of value as constituting notice of defect, see next section.)

Case No. 467. Daniels on Negotiable Instruments, 6th Ed., Sec. 777, p. 902.

“* * * it has been said that ‘the consideration for the transfer must be full and fair as well as valuable’ (citing cases in foot note) while in another case it is said that ‘when a parting with value is proved the amount of the consideration is not otherwise important than as bearing on the question of actual or constructive notice’ (citing *Gould v. Segee*, 5 Duer, 260). This latter view seems to us the correct one. The owner of a bill or note has as much right to sell it as he has to sell his horse. The prior parties, by making it negotiable, have warranted the right of the payee or indorsee to make title to another.

“And if he does so at any price, the holder acquires full rights and interests in the instrument, as against all parties, unless he had notice of defects, or wilfully abstained from inquiry under circumstances which justify the imputation of bad faith.”

Question 467: State the doctrine of the above paragraph and give an illustration.

Case No. 468. *Warman v. First National Bank*, 185 Illinois, 60.

Point Involved: Whether one is a purchaser in due course who on the acquisition of negotiable paper merely credits the transferor with the amount agreed upon.

MR. JUSTICE WILKIN: “* * *

“We think the authorities fully sustain the proposition that a bank does not become a purchaser of negotiable paper by discounting the same for one not indebted to it at the time, and merely placing the amount which the assignor is to receive to his credit by way of deposit. It is well understood that by a general deposit in bank the relation of debtor and creditor, merely, is created between the bank and depositor; and if in this case the bank became such a debtor to the rubber company, and if that indebtedness continued to exist at the time of the trial, it could have protected itself, if the defenses set up prevailed against the notes, by refusing to pay the deposit, and therefore could not claim the protection of being an innocent holder for value, or if it had paid any part of the deposit it would be entitled to protection *pro tanto*.”

Question 468: State the question that arose in this case and the Court's decision.

Sec. 330. To Be a Holder in Due Course One Must Acquire Title in Good Faith (Without Notice).

Case No. 469. Bradwell v. Pryor, 221 Illinois, 602.

Point Involved: Whether one who acquires negotiable paper under circumstances that would excite suspicions in the mind of a prudent man, is a holder in due course.

MR. JUSTICE WILKIN: “It is first insisted that the Appellate Court committed error in holding that where a party is about to receive a bill or note, and there are such suspicious circumstances accompanying the transaction or within the knowledge of the party as would induce a prudent man to inquire into the title of the holder or into the consideration of the paper, he is bound to make such inquiry, and if he neglects to do so he holds the bill or note subject to any equities which may exist between the previous parties. The above holding of the Appellate Court is based on the cases of Russell v. Haddock, 3 Gilm.

233, and *Sturges v. Metropolitan Nat. Bank*, 49 Ill. 220, and is undoubtedly supported by these authorities. But since the holding in those cases the rule has been somewhat modified by the decisions of this Court and is not sustained by courts generally throughout the country. The rule now is, that the endorsee or assignee of commercial paper who takes the same before maturity for a valuable consideration, without knowledge of any defects and in good faith, will be protected against the defenses of the maker, and mere suspicion of defect of title or the knowledge of circumstances calculated to excite suspicion in the mind of a prudent man, or even gross negligence on his part at the time of the transfer, will not defeat his title. In other words, the only thing which will defeat his title is bad faith on his part, and the burden of proof is upon the person assailing his right to establish that fact by a preponderance of the evidence. (*Matson v. Alley*, 141 Ill. 284; *Demis v. Horner*, 165 id. 347; *Merritt v. Boyden*, 191 id. 136; *Murray v. Beckwith*, 81 id. 43; *Shreeves v. Allen*, 79 id. 553.) However harsh this rule may, on first impression, seem to be, it is based upon the policy of the law which gives full faith and credit to commercial paper transferred before maturity, so that it may circulate, as far as possible, with all the conveniences of currency. We are of the opinion, therefore, that the Appellate Court improperly announced in its opinion, as the law of this state, the rule laid down in the earlier cases of *Russell v. Haddock*, and of *Sturges v. Metropolitan Nat. Bank*, *supra*."

Question 469: State the rule announced in this case.

Case No. 470. *McNamara v. Jose*, 28 Washington, 461.

Facts: McNamara bought for \$500.00 a promissory note for \$1,000.00 from the payee thereof, made by Alfred Jose, the defendant. The maker was known by the purchaser to be solvent, but the note though held in Washington, was payable at Nome, Alaska, inaccessible for six months in a year, and the note was not due for three months, and the payee was in need of money. The note

had been procured by payee from the maker through fraudulent representations. The maker had advertised his defense to the note, but the purchaser was unaware of this. The purchaser did not inquire of the maker as to the note, though such maker was conveniently accessible. The maker, defendant in this case, claims that the plaintiff cannot be considered an innocent purchaser.

Point Involved: Whether one who is offered paper at a discount is thereby put on notice of the defect in the title.

FULLERTON, J.: "The Negotiable Instruments Act of this state (Laws 1899, p. 350, 52) defines a holder in due course of a negotiable instrument to be one who has taken the instrument under the following conditions:

" '(1) That it is complete and regular upon its face; (2) that he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact; (3) that he took it in good faith and for value; (4) that at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it.'

"The act further provides (Id. 56) that, 'to constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith;' and (Id. 57), that 'a holder in due course holds the instrument free from any defect of title of prior parties, and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon.' But, notwithstanding this act positively provides that, to constitute notice of an infirmity in a negotiable instrument, the purchaser must have knowledge of such facts that his action in taking the instrument amounted to bad faith, we cannot think that the legislature meant to say that the purchaser of a negotiable instrument can shut

his eyes to the surrounding circumstances, remain in willful ignorance of facts which would have made known to him the infirmities of the instrument he purchases, and then claim, because he had no actual knowledge of such infirmities, that his title thereto is unimpeachable; but that it is still the rule that willful ignorance and guilty knowledge alike involve the result of bad faith. This, however, does not mean that the holder's title is to be overthrown by slight circumstances. He does not owe to the party who puts the paper afloat the duty of active inquiry in order to avert the imputation of bad faith. His rights are to be determined by the simple test of honesty and good faith, not by a speculative inquiry into diligence or negligence. Although he may have been negligent in taking the paper, and omitted precautions which a prudent man would have taken, nevertheless, unless he acted *mala fide*, his title will prevail. Crawford, Negotiable Instruments Law (2d ed.), p. 54.

“ ‘Suspicion of defect of title or the knowledge of circumstances which would excite suspicion in the mind of a prudent man, or gross negligence on the part of the taker, at the time of the transfer, will not defeat his title. That result can be produced only by bad faith on his part.’ Murray v. Lardner, 2 Wall. 110.

“ ‘Tested by these rules, is there anything in the evidence before us, which required the submission of the cause to the jury? We think not. Laying aside the fact that it was purchased at such a large discount there is nothing that even tends to show bad faith on the part of the appellant, and this one fact loses much of its persuasiveness when it is remembered that the note is payable at Cape Nome, which the Court judicially knows is on the coast of Alaska, inaccessible for a greater portion of the year, and not at any time in the line of regular communication. It certainly would not be sought by investors in commercial paper so long as there was a possibility of their being compelled to enforce its payment at that place. Again, the purchaser of a note at a discount is not of itself, under ordinary circumstances

evidence of bad faith. When it is very large, that circumstance may be considered in connection with other circumstances in determining the question of the purchaser's good faith; but unless the consideration be merely nominal, or so grossly inadequate as to lead to the conclusion that the purchase is made for the purposes of speculating upon the chances of collection, it is not of itself sufficient to justify a finding of bad faith."

Question 470: State the facts, the question presented and the Court's decision.

Case No. 471. Becker v. Hart, 120 N. Y. Supp. 270.

Facts: The facts appear in the opinion.

Point Involved: The circumstances that put one on notice or show that he actually had notice.

HIRSCHBERG, P. J.: "The promissory note on which the plaintiff sues was made and delivered by the defendants to one C. C. Murphy, and by the latter delivered, three or four weeks after its date, to David Levy. It was dated October 5, 1903, and was payable in the sum of \$1,825, on December 5, 1903, at the Twelfth Ward Bank. It is conceded that the makers, the defendants, were then, and at all times since have been, abundantly responsible; but Murphy demanded and received an indorsement by a person named Harlam, also presumed responsible. The defendants made payment to Levy on the note at different times until they paid it off. Some, if not all, of these payments were made after the maturity of the note. The note was not produced when these payments were made; Levy claiming that the plaintiff's son, Charles H. Becker, who was in his employ, had lost or mislaid the note and it could not be found. The statement that the note had been lost or mislaid was made in Charles H. Becker's presence. Levy died in the month of April or May, 1904, and about two years thereafter the plaintiff first made claim to be owner of the note, asserting that she had bought it from Levy through the agency

of her son, Charles H., and she then instituted this action for the recovery of the amount for which it was given. The note was never protested, and it does not appear that the plaintiff even required Levy to indorse it at the time she claims to have bought it from him. The learned trial Court submitted three questions to the jury: First, did the plaintiff become the holder of the note before maturity? To this question the jury answered, 'no.' Second, did the plaintiff pay anything for the note? To which the jury answered, 'no.' Third, did the plaintiff, at or before she became the holder, have any notice of any infirmity or defect in the title of the prior holder, Charles Becker, or knowledge of such facts that her acts in taking the instrument amounted to bad faith? To which question the jury answered, 'yes.' The jury found further that the note was in fact paid in full by the defendants, and the learned Court thereupon directed a verdict and judgment for the plaintiff.

"There are many facts and circumstances connected with the plaintiff's alleged ownership of the note which tend to make such ownership a proper consideration for the determination of a jury, and the Court could not dispose of the case as involving a question of law. While the transaction to which the plaintiff and her son testify might, perhaps, possibly be true, it nevertheless differs from the usual and ordinary commercial transactions in so many particulars as to present an issue of fact, aside from any question as to the credibility of witnesses. The purchase of the note was the only transaction of the kind in which the plaintiff had ever engaged. She claims to have bought the note at the solicitation of her son in the middle or latter part of October, 1903, and to have paid for it only the sum of \$1,000. The claim is made that Levy needed money at the time and was willing to suffer the enormous loss suggested for the sake of getting ready cash. There is nothing in the case to indicate why he should not have applied to the makers for the payment of the note at a satisfactory discount, or why he could not have procured a discount at the bank at the usual rate.

The plaintiff claims that the payment for the note was made with bank bills which she had kept for fifteen or twenty years in a tin box in her house. It appeared, however, that during that same time she had an account in the Brooklyn Savings Bank in her own name, which was opened in 1891 with a deposit of \$800, and from which she had drawn small sums from time to time until she had reduced the account at the time of the trial to the sum of \$75.48. When confronted with this account at the trial, she volunteered the statement that it represented money for her children; but it appeared that on examination before trial she testified to the existence of the account without this qualification. The note was not protested against the indorser, although the complaint alleges that it was, and no explanation was made why it was not protested, nor can any good reason be suggested, unless it be because Levy was still living at the time of the maturity of the note.

“Were there no other unusual or suspicious circumstances in the case than a claim to the purchase of an unquestionably good note, having less than six weeks to run, for but a little more than one-half of its face value, that fact alone would have required a submission of the case to the jury. While it is undoubtedly true that a valid purchase of a note may be made for less than its value, the discrepancy may be large enough to indicate falsity and bad faith. ‘As a general proposition it may be said that the amount paid is otherwise unimportant than as evidence to be considered by the jury upon the question of *bona fides*.’ American and English Encyclopedia of Law, vol. 4 (2d Ed.), p. 283. In *Canajoharie National Bank v. Diefendorf*, 123 N. Y. 191, 25 N. E. 402, 10 L. R. A. 676, it was held that the holders of negotiable paper are only entitled to the benefit of the rule of the commercial law which forbids its validity being questioned, when they have purchased such paper in good faith, in the usual course of business before maturity, and for full value. In *Second National Bank v. Weston*, 172 N. Y. 250, 257, 64 N. E. 949, 951, the Court said:

“ ‘The discount taken may be so great as to impeach the good faith of the purchaser, the same as chattel may be bought at so much under its true value as to justify the inference that the purchaser knew or suspected that it had been dishonestly acquired by his vendor. *Hall v. Wilson* (16 Barb. 548) has been cited in several late cases, but an examination of those cases will show that there the rate of discount was so excessive as to warrant the inference of bad faith. In *Canajoharie Nat. Bank v. Diefendorf*, *supra*, the notes of a perfectly responsible maker were purchased at a discount of from 15 to 18 per cent. from their face value. In *Vosburgh v. Diefendorf*, 119 N. Y. 357 (23 N. E. 801, 16 Am. St. Rep. 836), the notes of the same maker were purchased for 50 per cent. of their face value.’

“In the case then under consideration by the Court of Appeals, the rate of discount was only 8 per cent., and the Court held that it was not sufficiently great to predicate upon it any inference of bad faith. The rule, however, was not doubted that a discount might be large enough to predicate such inference upon; and it seems to me that in this case the discount of over 45 per cent. was of itself sufficient to take the case to the jury. When to this great deduction in the price of the alleged purchase is added the further facts that the purchase was made as an isolated transaction, that the sum of money alleged to have been paid for the purchase has been kept uninvested by a woman of scanty means for a period of fifteen or twenty years, notwithstanding that during those years she kept a savings bank account, that parties responsible for the debt were released by lack of protest for no reason which can be assigned, and that the purchase was concealed until after the death of the only individual who could successfully challenge its validity, the transaction must certainly be regarded as sufficiently unusual and suspicious, and at least so far inherently improbable, as to raise an issue of fact for the decision of a jury. The judgment and order should be reversed.”

Question 471: Summarize briefly the facts in this case, state the question presented and what the Court decided.

Sec. 331. A Purchaser from a Holder in Due Course Is a Holder in Due Course.

Case No. 472. Woodworth et al. v. Huntoon et al., 40 Ill. 131.

Facts: Purchase of a note negotiable in form, but *past due*, from an indorsee thereof, who acquired it before maturity. Defense that the note was in fact (though not in form) usurious.

Point Involved: Whether one who purchases under circumstances (as after maturity) which would prevent him from being a holder in due course if he purchased from one subject to defenses, but who takes from a holder in due course, takes the title of his transferror.

CHIEF JUSTICE WALKER: “* * * A note, tainted with fraud or other infirmity, passing into the hands of an innocent purchaser, not chargeable with notice, and for a valuable consideration, he acquires it purged of the defense, and any other person acquiring it of him succeeds to his rights in the same condition he held them. A defense to the instrument in the hands of the original holder, having been thus cut off, is not revived by the note being again transferred. * * *”

Question 472: (1.) State the facts, the question presented and the Court's decision in this case.

(2.) A made a note payable to B or order and acquired by B through fraud. B sold to C, a holder in due course. C negotiated the note to D, who acquired the instrument after its maturity, who gave no value, and who had notice of the fraud. Can D enforce this note against A?

Case No. 473. Andrews et al. v. Robertson, 111 Wisc. 334.

Facts: The payee of the paper sued on was subject to the defense of fraud. He transferred to another who was a holder in due course, and then re-acquired it.

Point Involved: Whether such a party could invoke the rule in favor of purchaser from a holder in due course

if he was formerly a holder against whom such defense would have been available.

MARSHALL, J.: “* * * The further claim is made that the plaintiffs are *bona fide* holders of the paper because they purchased it from their indorsee, who was an innocent holder thereof, paying full value therefor, and that the trial Court erred in refusing to permit proof of such repurchase for value. In that, they invoke the familiar common-law rule, which has recently been added to the statute law of the state, Sec. 1676-28, ch. 356, Laws of 1899, that the holder of commercial paper may recover on the strength of the title of a precedent innocent holder, regardless of knowledge on his part of fraud which would defeat it in the hands of the payee named therein. *Verbeck v. Scott*, 71 Wis. 59, 64. That rule is stated in the books, particularly in judicial opinions, generally in such a way as to lead one astray who is not familiar with the law on the subject, as to the extent of its application. It is not a universal rule. It does not apply to a case like this, where the payee of the paper, being so circumstanced at the start that he cannot recover thereon, transfers it to an innocent third party for value and subsequently purchases it back for value. Under such circumstances the payee cannot lean for support on the innocence of his vendee. His position is the same when he comes into possession of the paper the second time as when he first possessed it. One would say that must be the law without reference to authority; otherwise a person might become possessed of a promissory note of another by the grossest of frauds and by selling it to an innocent third person for value and subsequently repurchasing it enforce the same against the maker. The law contains no such open door as that for the successful perpetration of fraud. * * *”

Question 473: How did this case differ in fact from the one just preceding? Did this difference in fact produce a different outcome? Why?

Sec. 332. Amount Recoverable by Holder in Due Course.

Case No. 474. Cromwell v. County of Sac, 96 United States, 51.

Point Involved: Whether a purchaser for value is, in the case of defense made by the party liable, to be limited in his recovery to the amount paid by him.

MR. JUSTICE FIELD: "The plaintiff, therefore, holds the bonds and the subsequent coupons as his vendor held them, freed from all infirmities attending their original issue. Nor is he limited in his recovery upon them, or upon the other two bonds, as contended by counsel for the county, to the amount he paid his vendor. Clark had given full value for those he purchased, and could have recovered their amount from the county, and his right passed to his vendee. But independently of the fact of such full payment, we are of the opinion that a purchaser of a negotiable security before maturity, in cases where he is not personally chargeable with fraud, is entitled to recover its full amount against the maker, though he may have paid less than its par value, whatever may have been its original infirmity. We are aware of numerous decisions in conflict with this view of the law; but we think the sounder rule, and the one in consonance with the common understanding and usage of commerce, is that the purchaser, at whatever price, takes the benefit of the entire obligation of the maker. Public securities, and those of private corporations, are constantly fluctuating in price in the market, one day being above par and the next below it, and often passing within short periods from one-half of their nominal to their full value. Indéed, all sales of such securities are made with reference to prices current in the market, and not with reference to their par value. It would introduce, therefore, inconceivable confusion if *bona fide* purchasers in the market were restricted in their claims upon such securities to the sums they had paid for them. This rule in no respect impinges upon the doctrine that one who makes only a loan upon

such paper, or takes it as collateral security for a precedent debt, may be limited in his recovery to the amount advanced or secured."

Question 474: State the question presented and the Court's decision.

Case No. 475. Jefferson Bank v. C. W. L. Co., 123 S. W. (Tenn.) 641.

Point Involved: Same as in above case. Construction of Negotiable Instruments Act.

Facts: Suit on a note acquired by the plaintiff, Jefferson Bank, as indorsees of the payee, against the makers, the Chapman-White-Lyons Co.

Defense: That the note was executed by the defendant's vice-president in the company's name for unauthorized purposes, and secured by the payee with knowledge thereof and by fraud and without consideration. Defense, also, that the plaintiffs acquired the note at a discount and ought not in any event to recover more than it paid for it.

MCALLISTER, J.: " * * * It is said, however, * * * that in no event is the complainant entitled to recover exceeding the amount it paid for the note, with interest. It appears the decree below was for the full amount it paid for said note with interest and attorney's fees * * *. But we are of opinion that this question is now settled by Sec. 57 of the Negotiable Instruments Law which provides that the innocent holder may enforce payment of the instrument for the full amount thereof against all parties liable thereon."

Question 475: State this case.

CHAPTER SIXTY

DEFENSES NOT AVAILABLE AGAINST A HOLDER IN DUE COURSE (PERSONAL DEFENSES)

(Note: These defenses are the defenses of a usual sort.)

§ 333. Payment before maturity.

§ 334. Set-off.

§ 335. Want or failure of consideration.

§ 336. Fraud in consideration.

§ 337. Duress.

§ 338. Illegality.

§ 339. Theft and lack of delivery of instrument payable to bearer or properly endorsed.

§ 340. Lack of authority to execute instrument.

Sec. 333. Payment Before Maturity.

Case No. 476. Wilcox, Gibbs & Co. v. Aultman, 64 Georgia, 544.

Facts: The facts are given in the opinion.

Point Involved: Whether payment before maturity is a good defense against a holder in due course.

WARNER, CH. J.: "This was an action brought by the plaintiffs against the defendant on a draft drawn by him upon Messrs. Adams & Bareymore, payable to his own order, and endorsed by himself, for the sum of \$88.70, dated January 20, 1870, and due on the 6th day of November thereafter, * * *. The defendant pleaded payment. * * *

"It appears from the evidence * * * that the plaintiffs became the *bona fide* holders of the draft before its maturity for a valuable consideration, * * * re-

ceiving the same from Lloyd & Sons. The defendant testified that in the fall of 1870 he paid the draft to Lloyd & Sons, who told him that they did not have it but would get it and send him a receipt in three days, and gave defendant a receipt in full payment of the draft.

“* * * when the maker of a negotiable draft or note pays it to one who has not the possession of the paper at the time of such payment, so as to enable him to take it up, but takes a receipt for the money so paid instead of taking up his draft or note, such receipt will not protect him from the payment of the draft or note, when sued by a *bona fide* holder thereof before due. * * *.”

Question 476: State the facts, the question presented and the Court's decision in this case.

Sec. 334. Set-off.

(Note: Any set-off that the party liable might have had against the transferrer cannot be set up against a holder in due course.)

Sec. 335. Want or Failure of Consideration.

Case No. 477. First Nat. Bk. v. Skeen, 101 Mo. 683.

Facts: Suit on a note reading as follows:

“\$417.00. Holden, Mo., July 7, 1884.

“For value received, on or before the first day of September, 1885, the undersigned promise to pay to the order of the Springfield Engine & Thresher Company, four hundred and seventeen dollars, payable at Farmers' and Commercial Bank, Holden, Mo., with interest at eight per cent. from date until due, and ten per cent. after due.

J. W. F. FAUCHER,

W. A. SKEEN.”

The pleadings set up that plaintiff was a purchaser for value before maturity by indorsement from the payees. Defendant offered evidence tending to show that the note was given for machinery on a contract of

sale containing a warranty and that the consideration for which the note was given had failed.

Point Involved: Whether failure of consideration can be set up against a holder in due course.

BARCLAY, J.: (First deciding, in an illuminating opinion, that a note payable "on or before" a certain date is negotiable.)

"The decision of the foregoing point leaves little further to be said. Under the pleadings, the execution of the note and its transfer to plaintiff were admitted. When the latter produced the note, it amounted to evidence tending to prove that it had been acquired before maturity and for value. When plaintiff rested, defendant by his own evidence established that plaintiff had purchased the note, without notice of any failure of consideration, before maturity. Thereafter, defendant's offer to prove the failure of consideration, was properly rejected. It was irrelevant to the issues made by the pleadings, in view of the facts already before the Court, as disclosed by the proofs of both parties. In that state of the case, the Court correctly directed the jury to return a verdict for plaintiff on the undisputed facts."

Question 477: Can failure or want of consideration be set up against a holder in due course?

Sec. 336. Fraud in the Consideration.

Case No. 478. Grooms v. Olliff, 93 Georgia, 789.

Facts: They are stated in the opinion.

Point Involved: Whether fraud in the inducement or consideration for which the note was given is a good defense against a holder in due course. The difference between this fraud and "fraud in the procurement."

LUMPKIN, J.: "Olliffe & Co. brought suit in a Justice's Court upon a promissory note signed by Grooms, endorsed by Outland and payable to Donaldson or bearer. The defendants pleaded that the note was procured by

fraud, for that it was given for the purchase of a mare sold to Grooms by one Warters, who represented that the animal was perfectly sound in every respect, when in point of fact she was, both before and at the time of purchase diseased and totally worthless, all of which was well known to Warters, who fraudulently made the representations above mentioned for the purpose of deceiving Grooms and did thus deceive him into making and delivering the note to Donaldson. [There was a statute in Georgia making "fraud in the procurement" a good defense against every one. It was sought to make this statute of avail in the present case. The Court decides that fraud in the procurement does not mean the fraud brought out in this case.] We feel very sure that the words ("fraud in its procurement") were not intended to apply to cases of deceit, bad faith, or false representations used and made for the purpose of inducing one to enter into a contract, and to make and deliver his promissory note, knowingly and intentionally as an evidence of the same. It follows, we think, that fraud in these respects does not affect a *bona fide* holder for value, who obtains a negotiable promissory note before its maturity, without notice of any defect or defense. Such holder will be protected, even though the note was entirely without consideration, and was given as a result of the basest fraud, practiced upon the maker in inducing him to make the contract evidenced by the note."

Question 478: (1.) State the facts, the question presented and the Court's decision in this case.

(2.) What sort of fraud do you understand the Court to have meant by "fraud in the procurement?" Give an illustration. (See Case No. 33 and Case No. 484 for examples of fraud in the procurement [also called fraud in the execution or inception].)

Sec. 337. Duress.

Case No. 479. Mack v. Prang, 79 N. W. 770, 104 Wis. 1.

Facts: A wife executed her note and a mortgage on her separate property under threats of criminal prosecution of her husband for embezzlement. She was greatly alarmed at these threats, had several fainting spells and executed the note to save her husband from jail.

Point Involved: Whether duress is merely a personal defense available as between the parties, but not good as against a holder in due course.

WINSLOW, J.: “* * * There is some conflict in the authorities upon the question whether the defense of duress by threats can be successfully urged against a *bona fide* holder for value of a negotiable paper, but the better opinion and weight of authority, is that such defense stands upon the same footing as the defenses which may be made as between the original parties, but is cut off when the paper reaches the hands of a *bona fide* holder. Fairbanks v. Snow, 145 Mass. 153, 13 N. E. 596; Bank v. Butler, 48 Mich. 192, 12 N. W. 36; Clark v. Pease, 41 N. H. 414; Beals v. Neddo, 1 McCrary, 206, 2 Fed. 41; Martineau v. McCollum, 3 Pin. 455, 4 Am. & Eng. Ency. Law (2d Ed.) p. 334. Duress which consists of threats of imprisonment of a husband or child is a species of fraud, which renders the contract made under its influence voidable only and not void. Bank v. Kusworin, 91 Wis. 166, 64 N. W. 843. If it be simply a voidable contract, then it follows naturally that, when the contract consists of negotiable paper, the defense is cut off by transfer to a *bona fide* purchaser before maturity in the same manner that other defenses upon the ground of fraud are cut off. * * *”

(Note: The Negotiable Instruments Law makes a “duress” a real defense. Whether it changes the law as to all sorts of duress is still a question.)

Question 479: State the facts in this case and whether the defense of duress can be made as against a holder in due course.

Sec. 338. Illegality.

Case No. 480. Union Trust Co. v. Preston National Bank, 136 Mich. 460.

Facts: The question was whether the laws of Michigan making it unlawful for any employe of a bank to certify a check unless the amount thereof actually stood to the credit of the drawer, made such check void in the hands of an innocent purchaser for value.

Point Involved: Whether a negotiable instrument issued in breach of the positive statutory law making the act illegal, is enforceable in the hands of a holder in due course.

CARPENTER, J.: “* * * In accordance with these principles, we would assume, and, as heretofore stated, we do assume, that the legislature intended to make such contract void between the parties; and we would likewise assume that it did not intend, if the contract took the form of negotiable paper, to affect its validity in the hands of a *bona fide* holder. But plaintiff’s counsel contend that it is settled by authority that, when a contract is prohibited and made a crime by statute, such a contract, if it takes the form of negotiable paper, is void in the hands of a *bona fide* holder; and they rely upon the following authorities: * * *

“* * * The decisions referred to do not sustain the proposition for which they are cited. The section of Daniel cited has reference to cases where an express statutory provision declares a note void. We cannot follow this authority without repudiating our own decision of Vinton v. Peck, 14 Mich. 287, and the almost unanimous authority of other courts, * * *

“* * * We conclude, therefore, that, though the making of a contract is prohibited and made a crime by statute, yet that contract, if it takes the form of negotiable paper, is valid in the hands of a *bona fide* holder for value.
* * *

“If the section is construed as the plaintiff contends—

if checks duly certified are void in the hands of *bona fide* holders for value, because the amount thereof did not stand to the credit of the drawer on the books of the bank—this consequence follows: Certified checks, instead of being, as heretofore, the negotiable paper of the bank, and passing as current upon the faith of the bank's credit, will pass, if at all, only upon the credit of the particular bank official who certified it. Every person to whom a certified check is offered will be called upon to determine, not the credit of the certifying bank, not the authority of the certifying official, but the integrity and diligence of that official. Though one may have all confidence in such integrity and diligence, he may hesitate to take the check, because he fears that others to whom he may wish to transfer it lack such confidence. It will result, therefore, that certified checks, instead of being regarded in commercial circles with credit and favor, as heretofore, will be regarded with a degree of suspicion, and are likely to be discredited. If the legislature intended this consequence—and they must have intended it if they intended that the act should receive the construction contended for by plaintiff—it seems strange that they left their intent to be ascertained as a matter of doubtful inference; it seems strange that they still left to banks the power of certifying checks, without any clear suggestion that such power was so greatly limited. 'If the legislature intended the consequences claimed, we should expect it to say so.' (Press Co. v. Bank, 7 C. C. A., at page 249, 48 Fed. 322.)"

(Note: Some forms of illegality, in some states, make a negotiable instrument absolutely void for all purposes, but this is not true unless the statute positively so declares.)

Question 480: State the facts in this case, the question presented and the Court's decision.

Sec. 339. Theft and Want of Delivery of an Instrument Payable to Bearer or Properly Endorsed.

(Set out as Case No. 442, *supra*.)

Sec. 340. Lack of Authority to Execute Instrument.

(Set out as Case No. 475, *supra*.)

Case No. 481. Dowling v. Exchange Bank, 145 U. S. 512.

Facts: Suit by holder in due course on note given by a partner of a non-trading concern without the knowledge or benefit of his co-partner. The Court below held that the partners were liable on this note to the holder in due course, and so instructed the jury. The contention of defendant is that a member of a non-trading partnership is not liable upon the negotiable paper issued by a co-partner, unless authority had been given in the particular instance, or unless the firm had so carried on its business that it might be reasonably assumed that the partner issuing the paper had authority from the other to do so, and that this was a fact to be determined by the jury.

Point Involved: The power of a member of a non-trading partnership to bind the firm on its negotiable paper, in favor of a holder in due course of such paper.

“It is not disputed that the execution by Edward P. Ferry, in the name of F. H. White & Co., of the notes in suit was without express authority of his partners, and that neither of the notes was given or used in the business of that firm. The primary question therefore is, whether, for the protection of the plaintiff a *bona fide* purchaser for value, it will be conclusively implied, as matter of law, from the nature or course of the firm’s business, that Edward P. Ferry had authority from his partners to make those notes or either of them.

“Mr. Justice Clifford, speaking for the Court in *Kimbro v. Bullitt*, 22 How. 256, 268, said that ‘wherever the business, according to the usual mode of conducting it, imports, in its nature, the necessity of buying and selling, the firm is then properly regarded as a trading partnership, and is invested with all the powers and subject to all the obligations incident to that relation,’ citing among

other cases, *Winship v. Bank of United States*, 5 Pet. 529, 561. Mr. Justice Story said that the doctrine that each partner may bind the firm by bills of exchange, promissory notes and other negotiable instruments is generally limited to partnerships in trade and commerce, and does not apply to other partnerships unless it is the common custom or usage of such business to bind the firm by negotiable instruments, or it is necessary for the due transaction thereof. Story on Partnership, sec. 102, a. * * *

“It is very clear that the articles of agreement between Ferry, White and Dowling did not create a partnership, each member of which had, under the settled rules of commercial law, and as between the firm and those dealing with it, authority to give negotiable paper in its name. The firm was of the class denominated in many adjudged cases as non-trading or non-commercial firms, the members of which could not be held, as matter of law, and by reason of the nature of the partnership business, to have authority to execute negotiable instruments in the name of the firm.

“We quite agree with the learned judge who presided at the trial that the liability of a partnership upon negotiable instruments executed by one partner in the name of the firm exists not only where the firm is a trading or commercial partnership, but ‘where the actual course of business pursued adopts the practice of issuing the mercantile paper of the firm to accommodate its necessities or convenience whenever the occasions occur.’ But the difficulty in this case is that the jury were not permitted to determine, from a consideration of all the circumstances of the case, what, in view of the admitted nature of the business of F. H. White & Co., was necessary and proper to its successful operation, what was involved in the usual and ordinary course of its management by those engaged in it, or what should be inferred from the actual course and conduct of the partnership, so far as it was known, or ought reasonably to have been known, to the parties sought to be charged with liability on the notes

in suit. We do not deem it necessary to make a detailed statement of the numerous facts disclosed by the evidence, or to suggest what inference might be drawn from them. It is sufficient to say that the issue as to whether the defendants were estopped to dispute the authority of Edward P. Ferry to make the notes in suit, in the name of F. H. White & Co., was one peculiarly for the jury, under all the facts indicating the nature, necessities, and course of business of the firm, and under proper instructions from the Court as to the legal principles by which they should be guided in determining the case."

Question 481: (1.) Does a partner in a *trading* partnership have apparent authority to bind the firm for firm purposes on negotiable paper? If such paper is issued for other purposes, can this be set up against a holder in due course?

(2.) When can a holder in due course hold a partner in a non-trading partnership on negotiable paper wrongfully issued by his partner?

CHAPTER SIXTY-ONE

DEFENSES AVAILABLE AGAINST A HOLDER IN DUE COURSE (REAL DEFENSES)

§ 341. Personal incapacity of defendant.

§ 342. Forgery.

§ 343. Fraud in the execution.

§ 344. Material alteration.

§ 345. Illegality where the statute expressly declares the instrument void.

Sec. 341. Personal Incapacity of Defendant.

Case No. 482. Hosler v. Beard, 54 Ohio St. 398.

Facts: Beard while insane, but not yet so declared judicially, gave a promissory note to one Glathart who sold it in due course to Hosler, the present plaintiff. Defense, insanity at the time of the execution of the note.

Point Involved: Whether the maker of a note may defend against a *bona fide* holder that he was insane when he gave the note.

WILLIAMS, C. J.: "The material question then is whether that rule of commercial law which protects negotiable paper in the hands of a *bona fide* holder, who has acquired it before its maturity, for value, is applicable to such paper signed by persons who at the time were *non compos mentis*, where there has been no ratification of it; and that it is not, is well settled. Such paper being invalid, except to the extent that it is founded upon a consideration of necessities, or other valuable consideration, actually furnished, an action dissociated from such consideration cannot be maintained upon it, when the incapacity of the maker is shown; and the quality of nego-

tiability does not attach to it, though made negotiable in form; and every holder of such paper is chargeable in law with notice of the status of the maker as it existed at the time of its execution, and stands, therefore, in no better position, so far as his right of action against the maker is concerned, than the payee from whom he obtained it; and a want of actual knowledge, when he received the note, of the maker's mental condition when it was signed, makes no difference in that respect. So far as we have been able to discover, the authorities uniformly maintain that the paper of persons *non compos*, infants, and *feme* coverts at common law, all resting upon much the same principle, is not within the commercial rule which protects a *bona fide* holder of a negotiable note, received before it became due, from the defenses which the maker might have made against the payee; and that, in defense to such paper in the hands of such a holder, the maker's incapacity to execute it may be shown."

Question 482: What was the point at issue in this case? Did it prevail? Why?

(2.) Suppose the maker in this case had been a minor. Would the defense have prevailed?

Sec. 342. Forgery.

Case No. 483. Ehrler v. Braun, 120 Illinois, 503.

MULKEY, J.: " * * * That the notes * * * are forgeries we think is established by the decided weight of evidence. * * * Conceding, then, as we must, that the notes in the hands of the appellant are forgeries, it is very clear that the fact that she is a *bona fide* holder for value cannot avail her anything unless appellee has so acted in respect to them as to estop him from interposing their original infirmity as a defence,
* * * "

Question 483: Is forgery a good defense against a holder in due course? Might there be circumstances under which the defense would not be good?

Sec. 343. Fraud in the Execution.

Case No. 484. Auten v. Gruner, 90 Illinois, 300.

Facts: Suit by indorsee of a note signed by defendant. The payee of the note was a traveling peddler, selling churns for \$10.00, one of which defendant purchased and was asked to sign a note for ten dollars at six months as the price thereof. He read the note twice and saw that it was for ten dollars. By some trick, that he could not explain, a note for \$300 was inserted in the stead of the note read by the defendant, and his signature thereby obtained.

Point Involved: Whether fraud in the execution or procurement, i. e., in the nature of a trick, by which the signature is obtained to a different instrument than one meant to sign, is a good defense against a holder in due course.

MR. JUSTICE SCOTT: “* * * Adhering as we do to what has been said in our former decisions, as to the degree of caution to be observed by the maker of negotiable paper before he will be permitted to defend against his note in the hands of an innocent assignee before maturity on the ground it was obtained by fraud and circumvention, still, we think the evidence in this record does not show defendant omitted to observe due care, or that he was guilty of such negligence as ought, equitably, to estop him from defending against the note in suit. He bought a churn from a stranger for the use of his family, for the sum of \$10, and supposed he was giving his note for that amount. Observing unusual care he twice read the note and could discover nothing wrong about it. That he was tricked into signing the note in controversy was no fault of his, and he does not even know how it was done.”

Question 484: (1.) State the facts, the question presented and the Court's decision in this case.

(2.) Suppose the defendant had not read the note, would his defense be good?

Sec. 344. Material Alteration.

Case No. 485. Merritt v. Boyden, 191 Ill. 136.

Facts: Suit was brought on a promissory note, reading as follows:

“1300. Kewanee, Illinois, Oct. 4, 1897.

One year after date I promise to pay to the order of ourselves thirteen hundred dollars at Kewanee, Ill. Value received, with interest at the rate of seven per cent per annum.

(sd.) L. SILVERMAN,
H. CLAY MERRITT.”

Indorsed on back:

“L. Silverman.
H. Clay Merritt.”

Boyden & Son paid \$1300 for the note, acquired it before maturity and had no notice of any alteration. The defense was based on the alternative two theories: (1) That the note as originally delivered contained the figures “\$100” in the margin, and the words “one hundred dollars” in the body of the note, and that the figures “\$100” were altered to read “\$1300,” and the word “one” before “hundred” was erased, and the word “thirteen” inserted in its stead; or

(2) That the word “one” was not in the body of the note, but that there was a blank space in which the word “thirteen” had been inserted.

The Court in the course of its opinion said: “First, If the note was altered by (the first method) then the alteration amounted to a forgery and appellant is not liable on the note, even though appellees were *bona fide* purchasers thereof for value without notice or knowledge of the change. If the amount named in the note is raised by erasing what is written, such alteration is a material one, and the note is thereby vitiated so as to become void. * * * Where a note is complete at the time when it is signed by the maker, its subsequent alteration by raising the amount thereof through obliteration of the

same by the use of any chemical process, or other ingenious device, without the knowledge or consent of the maker, will discharge him from liability upon the note.

* * * (The Court found this theory unsupported by the evidence.)

“The second theory of the defense * * * was that, when he signed and endorsed the note, there was a blank space before the word ‘hundred’ and that this blank space was subsequently filled by inserting the word ‘thirteen’ therein without the knowledge or consent of the appellant. * * * When the maker of the note has, by careless execution of the instrument left room for an alteration to be made by insertion without defacing the instrument or exciting the suspicion of a careful man, and the instrument by reason of the opportunity thus afforded is subsequently filled up with a larger amount than that which it bore at the time it was signed, the maker will be liable upon it as altered to any *bona fide* holder without notice.” (This left the contention that the marginal figures had been altered to be disposed of. For even though the makers of the note were negligent as to the body of the note, the marginal figures must have been erased and changed. As to that the Court said:) “The marginal figures have been held to be not part of the instrument, but to be intended merely as a convenient index, and as an aid to remove ambiguity or doubt in the instrument itself. The alteration or erasure of the marginal figures is an immaterial alteration and will not affect the rights of the holder of the instrument.”

Question 485: (1.) What were the theories of the defense? How were they disposed of?

(2.) What did the Court say with reference to the duty of a maker of negotiable paper to fill in blank spaces, so that the check could not be easily altered? (For another view, see the next case.)

Case No. 486. National Exchange Bank v. Lester, 194 N. Y. 461.

Facts: See the opinion.

WILLARD BARTLETT, J., delivered the opinion of the Court:

“As this case went to the jury, they might well have found that the note in suit was a note for only \$75 when originally prepared by the maker and indorsed at his instance by the defendant, and that it had subsequently been altered to a note for \$375 when discounted by the plaintiff bank. They were instructed in substance, however, that the indorser was liable for the amount of the note as raised by the alteration, if he had been careless and negligent in placing his name upon the instrument while there were spaces thereon which permitted the insertion of the words and figure whereby it was transmuted from a note for \$75 into a note for \$375. Conceding that the contract which he actually signed bound him only to pay the smaller amount, the jury were permitted to find that, in consequence of his negligence in the respect indicated, it had become a contract which bound him to pay the larger amount to a subsequent innocent holder of the paper.

“In support of the correctness of this ruling, the learned counsel for the respondent asserts the doctrine that ‘a party to a note who puts his name to it in any capacity of liability, when it contains blanks uncanceled facilitating an alteration raising the amount, is liable for the face of the note, as raised, to an innocent holder for value;’ and he declares that this doctrine has been approved and apparently adopted in Alabama, California, Colorado, Illinois, Kansas, Kentucky, Louisiana, Michigan, Missouri, Nebraska and Pennsylvania. In considering his proposition, it is important to bear in mind a radical distinction which exists between two classes of notes to which the adjudicated cases relate: (1) Those notes in which obvious blanks are left, at the time when they are made or indorsed, of such a character as manifestly to indicate that the instruments are incomplete until such blanks shall be filled up; and (2) those notes which are apparently complete, and which can be regarded as containing blanks only because the written

matter does not so fully occupy the entire paper as to preclude the insertion of additional words or figures or both. It is a note of the latter class that we have to deal with here. One who signs or indorses a note of the first class has been held liable to *bona fide* holders thereof, in some of the cases cited by the respondent, according to the terms of the note after the blanks have been filled, on the doctrine of implied authority, while, in other cases, relating to notes of the second class, the liability of the maker or indorser for the amount of the note as increased by filling up the unoccupied spaces therein is placed upon the doctrine of negligence or estoppel by negligence. The cases cited by respondent in which parties to commercial paper, executed by them while obvious blanks remained unfilled thereon, have been held liable upon the instrument as completed by filling out such blanks, on the ground of implied authority, require no further consideration here, as there is no suggestion that there was any blank of this character upon the note in suit. These cases are: *Winter v. Pool*, 104 Ala. 580, 16 So. 543; *Statton v. Stone*, 15 Colo. App. 237, 61 Pac. 481; *Cason v. Grant County*, 21 L. R. A. (N. S.) *Deposit Bank*, 97 Ky. 487, 53 Am. St. Rep. 418, 31 S. W. 40; *Weidman v. Symes*, 120 Mich. 657, 77 Am. St. Rep. 603, 79 N. W. 894. There were obvious blanks also in the notes under consideration in *Visher v. Webster*, 8 Cal. 109, and *Lowden v. Schoharie County Nat. Bank*, 38 Kan. 533, 16 Pac. 748, and the decision in each of these cases appears to have proceeded upon the doctrine of implied authority rather than negligence.

“It must frankly be conceded, however, that the respondent finds support, for the doctrine which it asserts in the case at bar, in the decisions of Pennsylvania, Illinois, and Missouri, so far as the maker of commercial paper is concerned, and in those of Kentucky and Louisiana, in respect to the liability of a party who has indorsed or become surety upon a note in which there were spaces (not obvious blanks) that permitted fraudulent insertions enlarging the amount. *Garrard v. Haddan*, 67 Pa. 82, 5

Am. Rep. 412; *Yocum v. Smith*, 63 Ill. 321, 14 Am. Rep. 120; *Scotland County Nat. Bank v. O'Connel*, 23 Mo. App. 165; *Hackett v. First Nat. Bank*, 114 Ky. 193, 70 S. W. 664; *Isnard v. Torres*, 10 La. Ann. 103. I am of opinion that no liability on the part of the indorser for the amount of such a note as raised can be predicated simply upon the fact that such spaces existed thereon. This conclusion I base upon the authorities to that effect which I have already discussed, and upon what seem to me to be considerations of sound reason independent of judicial authority. An averment of negligence necessarily imports the existence of a duty. What duty to subsequent holders of a promissory note is imposed by the law upon a person who is requested to indorse the paper for the accommodation of the maker, and who complies with such request? It is a complete instrument in all respects as to date, name of payee, time and place of payment, and amount. There are, it is true, spaces on the face of the instrument in which it is possible to insert words and figures which will enlarge the amount, and still leave the note apparently a genuine instrument; in other words, there is room for forgery. On what theory is the indorser negligent because he places his name on the paper without first seeing to it that these spaces are so occupied by cross lines or otherwise as to render forgery less feasible? It can only be on the theory that he is bound to assume that those to whom he delivers the paper, or into whose hands it may come, will be likely to commit a crime if it is comparatively easy to do so. I deny that there is any such presumption in the law. It would be a stigma and reflection upon the character of the mercantile community, and constitute an intolerable reproach of which they might well complain as without justification in practical experience or the conduct of business. That there are miscreants who will forge commercial paper by raising the amount originally stated in the instrument is too true, and is evidenced by the cases in the law reports to which we have had occasion to refer; but that such misconduct is the rule, or is so general as to justify the

presumption that it is to be expected, and that business men must govern themselves accordingly, has never yet been asserted in the state, and I am not willing to sanction any such proposition either directly or by implication. On the contrary, the presumption is that men will do right rather than wrong. See *Bradish v. Bliss*, 35 Vt. 326. As was said by Judge Cullen in *Critten v. Chemical Nat. Bank*, 171 N. Y. 219, 224, 57 L. R. A. 529, 63 N. E. 969, it is not the law that the drawer of a check is bound so to prepare it that nobody else can successfully tamper with it. Neither is it the law that the indorser of a promissory note complete on its face may be made liable for the consequences of a forgery thereof simply because there were spaces thereon which rendered the forgery easier than would otherwise have been the case."

Question 486: (1.) What did the Court hold in this case with reference to the liability of a party on negotiable paper because he left blanks that might be filled?

(2.) Which do you believe to be the sounder view? Why?

Sec. 345. Illegality Where the Statute Expressly Makes the Instrument Void for All Purposes.

(Note: As shown by the case in the preceding chapter, illegality is no defense against a holder in due course. The statute, however, as to some forms of illegality, may make an instrument absolutely void for all purposes and in every person's hands. Some states have statutes of this sort, not as to illegality generally, but as to some special forms, such as gambling.)

CHAPTER SIXTY-TWO

LIABILITY OF PARTIES

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| § 346. Liability and admissions of the maker. | § 350. Liability of transferror by delivery or qualified endorser. |
| § 347. Liability of the drawer. | |
| § 348. Liability and admissions of the acceptor. | § 351. Liability of unqualified endorser. |
| § 349. Liability of party endorsing irregularly. | |

Sec. 346. Liability and Admissions of the Maker.

Case No. 487. McMann et al. v. Walker, 31 Col. 261.

Facts: The plaintiff sues as indorsee of a note made by defendant to the order of the Sprague Collection Agency and by such payee endorsed to plaintiff. The Sprague Collection Agency was a foreign corporation in the state of Colorado and had not complied with the foreign corporation law of the state of Colorado, requiring compliance therewith before qualified to transact business in that state. The defendant contends that the note is invalid.

Point Involved: Whether the maker of a note can set up as against the indorsee that the note is void because the payee corporation has not complied with the foreign corporation laws.

GARBERT, J.: “* * * The question is one which has been discussed by the courts of several states, with the result that the decisions on the subject are not altogether harmonious. Whether or not the note in question be in-

valid as between the maker and the payee is a question upon which we express no opinion, because that proposition is not involved, * * *. In this state the general rule of law prevails that negotiable paper, although invalid as between the original parties, is valid as to third persons obtaining it for value before maturity and without notice of its infirmities, unless so declared by statute.

* * * The defendant, by giving a note which is not the subject of statutory enactment thereby conclusively admitted as to third parties purchasing before maturity and in good faith, the legal existence of the payee, and its authority to take such note and to negotiate and transfer it by endorsement. * * *."

Question 487: What did the Court say that the maker admitted as to his payee?

Sec. 347. Liability of the Drawer.

Case No. 488. Uniform Negotiable Instruments Act, Sec. 61.

"The drawer, by drawing the instrument, admits the existence of the payee and his then capacity to indorse; and engages that on due presentment the instrument will be accepted or paid, or both, according to its tenor, and that, if it be dishonored, and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it. But the drawer may insert in the instrument an express stipulation negating or limiting his own liability to the holder."

Question 488: (1.) Can the drawer deny the existence of the payee or his capacity to endorse?

(2.) Suppose the drawee refuses to accept or pay according to the tenor of the instrument, can recourse be had to the drawer? Upon what condition?

Sec. 348. Liability and Admissions of the Acceptor.

Case No. 489. Price v. Neal, 3 Burrows, 1354.

Facts: Suit brought by Price against Neal. It was proved on the trial that two bills were drawn, one of which read as follows:

“Leicester, 22d November, 1760. Sir, six weeks after date pay Mr. Rogers Ruding or order forty pounds, value received for Mr. Thomas Poughfor; as advised by, Sir, your humble servant Benjamin Sutton. To Mr. John Price, in Bush-lane, Gennon Street, London,” indorsed, etc.

That this and the other bill was indorsed by Neal who gave value therefor, and that the bill being presented to Price, he by one of his clerks, paid it to Neal. This bill was forged by one Lee, but this was unknown to Price or Neal.

This suit is to recover back the money paid by the acceptor to the holder on these forged bills.

Point Involved: Whether a drawee of a forged bill of exchange, who pays the same to a *bona fide* holder for value, can recover back the amount so paid on discovering the forgery.

LORD MANSFIELD: “But it can never be thought unconscientious in the defendant to retain this money when he has once received it on a bill of exchange indorsed to him for a fair and valuable consideration, which he had *bona fide* paid, without the least privity or suspicion of any forgery.”—*Verdict for defendant.*

Question 489: State the facts, the question presented and the Court’s decision in this case.

Case No. 490. National Bank of Rolla v. First National Bank, 141 Missouri Appeals, 719.

Facts: Martin L. Chambers made out a check payable to J. B. Ragan, on the National Bank of Rolla, and forged the signature of H. W. Lennox thereto. The said Cham-

bers thereupon went to the First National Bank of Salem and represented himself to be the payee and endorsed the payee's name and secured the money, the cashier knowing none of the parties and requiring no identification. The Bank of Salem thereupon guaranteed the endorsements as genuine and sent the check to the drawee bank. The cashier of such bank knew that the signature was not that of Ragan but he knew Ragan and Lennox had some dealings together and he noticed that the indorsements were guaranteed by the Salem Bank, and he thereupon remitted the money to the Salem Bank. The cancelled check was then sent as a voucher to Lennox and Lennox returned it as a forgery, and the bank re-credited him with the amount. The Bank of Rolla then wrote to the Bank of Salem and demanded payment on the check on the ground that the Bank of Salem had guaranteed the signatures. The Bank of Salem responded that it would not pay inasmuch as it considered itself not liable, whereupon this suit was brought by the Bank of Rolla against the Bank of Salem.

Point Involved: Whether a drawee of a check or bill who pays the same to a *bona fide* holder, can recover back the amount it has paid upon such check being discovered to be a forgery.

GRAY, J. (after reviewing many authorities): “* * * In addition to the authorities, the Negotiable Instruments Act of 1905, contains the following sections:

“‘Sec. 62. The acceptor by accepting the instrument engages that he will pay it according to the tenor of its acceptance; and admits: the existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the instrument; and the existence of the payee and his capacity to endorse.

“* * *

“The adoption in this and other states of our Negotiable Instruments Law was for the purpose of having in the statutory laws of the states a uniform law in regard to commercial paper. * * * There was no question upon which the courts were more in conflict than

upon the question involved in this case. After a careful examination of the new law we are inclined to believe that it was intended to adopt the law as declared in *Price v. Neal, supra.*”

Question 490: State the “point involved” and the Court’s decision in this case.

Sec. 349. Liability of Party Indorsing Irregularly, Etc.

Case No. 491. *Rockfield et al. v. First National Bank of Springfield, 77 Ohio St. 311.*

Facts: A note was made in the following form: “\$10,000. Springfield, Ohio, December 12, 1904. On demand after date, we jointly and severally promise to pay the First National Bank of Springfield, Ohio, or order, at its banking house, ten thousand dollars for value received, with six per cent interest after date. (Signed) The Springfield, Charleston, Washington & Chillicothe Railway Co., H. L. Rockfield, President; E. H. Ackerson, Secretary.” On the back of the note appeared these names: “John Snyder, Frank Patterson, L. M. Goode, E. H. Ackerson.” The First National Bank brings suit on this instrument against these parties whose names are on the back of the notes, averring that such names were on the note prior to its delivery. Defense, that the defendants signed for accommodation only, receiving no consideration, and that they were not notified by the holder of the note of its non-payment by the maker at maturity.

Point Involved: The nature of the undertaking of parties irregularly endorsing a note before its delivery; whether such parties are indorsers and as such entitled to the notice of dishonor which the law requires to be given to indorsers in order to charge them.

SPEAR, J.: “* * * The theory of the defendants’ pleading is that Rockford and Snyder, by writing their names across the back of the note, became indorsers in the commercial sense, and therefore entitled to notice of

demand at maturity of the maker and of non-payment, and, failing that, no liability attached. The theory of the petition [of the plaintiff] is that these defendants, having signed the note before delivery, must be held to have signed with the purpose of giving it credit and of aiding negotiability, and therefore stand as makers, and although their names appear on the back of the instrument, and they are in law sureties, yet they are not indorsers in the commercial sense and therefore not entitled to notice of demand and non-payment. This view is the one adopted by the trial Court. * * * Which is the correct view is the question we have. * * * That the conclusion adopted by the lower courts is in accord with the law as held in this state from early times and with all the decisions of this Court thus far made is conceded.

* * *

“The statute referred to is the act of April 17, 1902, known as the Negotiable Instruments Act. * * * By the provisions of these sections * * * a person placing his signature upon an instrument otherwise than as maker, drawer, or acceptor is deemed to be an indorser unless he clearly indicates by appropriate words his intention to be bound in some other capacity. Then follows as to liability, this: Where a person not otherwise a party to an instrument places thereon his signature on blank before delivery, he is liable as indorser: (1) If the instrument is payable to the order of a third person, he is liable to the payee and all subsequent parties. (2) If the instrument is payable to the order of the maker or drawer, or is payable to bearer, he is liable to all parties subsequent to the maker or drawer. (3) If he signs for the accommodation of the payee he is liable to all parties subsequent to the payee. Every indorser who indorses without qualification guarantees to all subsequent holders the genuineness of the instrument, the title, the capacity of previous parties to contract, etc., and engages that on due presentment, the instrument shall be accepted or paid, or both, as the case may be, and that if it be dishonored and the necessary proceedings on dishonor be

duly taken, he will pay the amount thereof to the holder or to any subsequent indorser who may be compelled to pay it. Presentment for payment must be made at a reasonable hour on a business day at a proper place to the person primarily liable on the instrument, or, if he is absent or inaccessible to the person found at the place where the presentment is made. When such instrument has been dishonored by non-acceptance or non-payment notice of dishonor must be given to the drawer and to each indorser and any drawer or indorser to whom such notice is not given is discharged.

“* * *

“It follows from these conclusions that by force of sections * * * of the Revised Statutes of 1906, a person who, being a stranger to a promissory note, places his name on the back by blank indorsement, is an indorser of the paper and cannot be held in any other capacity. As such, he is entitled in order to render him liable, to notice of demand upon those who are primarily liable, and failing such demand, and due notice to him, he is discharged. The answer [of the defendant] therefore, stated a defense and the sustaining of the demurrer and rendering judgment for the bank upon the note was error.”—*Judgment reversed and cause remanded.*

Question 491: (1.) In what manner did the defendants in this case sign?

(2.) What was their defense?

(3.) On what theory did the plaintiff attempt to hold them?

(4.) What did the bank omit to do that freed the indorsers from liability?

(5.) What was the law of Ohio on this point prior to the enactment of the Uniform Law in 1902? Would the defense have been good prior to that date? Why?

(6.) Did the Negotiable Instruments Act change the Ohio law?

Sec. 350. Liability of Transferor by Delivery or Qualified Endorser.

Case No. 492. Uniform Negotiable Instruments Act, Sec. 65.

“Every person negotiating an instrument by delivery or by a qualified indorsement, warrants:

“1. That the instrument is genuine and in all respects what it purports to be.

“2. That he has a good title to it.

“3. That all prior parties had capacity to contract.

“4. That he has no knowledge of any fact which would impair the validity of the instrument, or render it valueless.

“But when the negotiation is by delivery only, the warranty extends in favor of no holder other than the immediate transferee.

“The provisions of subdivision three of this section do not apply to persons negotiating public or corporate securities, other than bills and notes.”

Question 492: (1.) When one transfers an instrument by delivery (i. e., without indorsement) and the maker fails to pay, can such transferee be made to pay?

(2.) What does such a transferee warrant?

(3.) What is the liability of one who endorses without recourse?

Case No. 493. *Challis v. McCrum*, 22 Kas. 157.

Facts: The plaintiff McCrum purchased, after its maturity, a note which was indorsed to him “Without recourse. W. L. Challiss.” When plaintiff sued the maker, the maker successfully interposed the defense of usury and thereby defeated in part the payment of the note. Thereupon McCrum brought this action against his indorser.

Point Involved: Whether one who endorses “without recourse” can be held for the invalidity of the note?

BREWER, J.: “* * * the restriction is only as to his liability as indorser and in no manner affects his relation to the paper as vendor. An unqualified indorsement is the assumption of a conditional liability. * * *

“Without recourse does away with this conditional liability. It leaves the indorsement simply as a transfer of title, and the indorser liable only as vendor; yet it leaves

him a vendor and divests him of none of the liabilities of the vendor. It makes the transaction the equivalent of a delivery of paper payable to bearer and transferable by delivery. Independent therefore of any matter of indorsement, what implied warranty is there in the transfer of a promissory note? Two things are clear under the authorities: first, that there is an implied warranty of the genuineness of the signatures; and second, that there is no warranty of the solvency of the parties * * *. But in the case at bar the signature of the maker was genuine. The objection is that it was never his legal obligation to the full amount of what it purported to be. How far is there any implied warranty in this respect? [Here the Court reviews authorities.] These authorities fully sustain the ruling of the district court. * * * By all these authorities there is an implied warranty against such a defect and the vendor is liable for the breach thereof. * * *.”

Question 493: What was the defect in the note in question? In what manner did defendant sign? Was he held liable? Why? Does such an indorser warrant solvency? Does he warrant genuineness of prior signatures?

Sec. 351. Liability of Unqualified Endorser.

Case No. 494. Uniform Negotiable Instruments Act, Sec. 66.

“Every endorser who indorses without qualification, warrants to all subsequent holders in due course:

“1. The matters and things mentioned in subdivisions one, two, and three, of the next preceding section; and

“2. That the instrument is at the time of his endorsement valid and subsisting.

“And, in addition, he engages that on due presentment it shall be accepted, or paid, or both, as the case may be, according to its tenor, and that if it be dishonored, and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it.”

Question 494: (1.) What does an unqualified indorser warrant in his capacity as vendor?

(2.) What is his contract as indorser?

Case No. 495. Dale v. Gear, 38 Conn. 15.

Facts: Dale as indorsee sues Gear as indorser on a note. The defendant pleads as a defense that it was orally agreed between them that the defendant's liability should be as if he signed "without recourse."

Point Involved: Whether an indorser as against his immediate indorsee can introduce parol evidence of an agreement to qualify the indorsement.

BUTLER, C. J.: "We have given this case the consideration which, as involving an important commercial question, it has seemed to require, and we are of opinion that the plea cannot be sustained on principle or by authority.

"First, it is not sustainable on principle.

"The rule that parol evidence is not admissible to contradict or vary a written contract is founded in the highest principles of public policy and there is no class of contracts to which it should be more inflexibly applied than to those connected with bills of exchange and promissory notes. * * *

"But it has sometimes been claimed, and is claimed in support of the plea in this case, that notwithstanding the rule is so applied in favor of a *bona fide* holder to whom the note has been negotiated, yet, as between the indorser and the indorsee, the original parties to the contract of indorsement, the rule should not be applied. But the answer must be, that the contract of indorsement is implied by law as clearly and perfectly from the blank indorsement of a negotiable note, irrespective of any contingency of negotiation as if written out in full when indorsed. And if, as between the original parties, there is any equity existing *dehors* the instrument, which should prevent the indorsee from enforcing the contract, it must be set up as an *equity*. * * *

“There are four classes of cases in which as exceptional cases, and as between the original parties, indorser and indorsee, any relation, antecedent agreement, or state of facts from which a controlling equity arises, may be pleaded and proved by parol in bar of an action on the warranty. Thus the relation of principal and agent may be shown—for the agent takes no title or warranty from the indorser, but holds as *agent*. So, second, it may be shown, that the note was indorsed to the holder for some special purpose and is holden *in trust*, as where it is indorsed and delivered for collection merely. *Lawrence v. Stonington Bank*, 6 Conn. 521, is an example of this class of cases in our own reports. In like manner, thirdly, the relation of principal and surety may be shown, and that the indorsement was made at the request and for the accommodation of the immediate indorsee, for the relation forbids the enforcement of the contract. Such was *Case v. Spaulding*, 24 Conn. 578. So, fourthly, it may be shown that there was an equity arising from an *antecedent transaction* including an agreement that the note should be taken in sole reliance on the responsibility of the maker and that it was indorsed in order to transfer the title in pursuance of such agreement, and that the attempt to enforce is a *fraud*. Such was *Downer v. Chesebrough*, 39 Conn. 39. These exceptions illustrate the rule. But this plea shows no equity, trust, equitable relation, or equity connected with an antecedent transaction constituting a consideration for the agreement, or which would justify a court of equity in interfering to prevent an enforcement of the contract of warranty which the law implies. It presents a naked case of an attempt to prove by parol that a clear and unambiguous contract of warranty is not such, and to contradict it in terms—to turn an indorsement *without restriction*, before maturity into a restricted [qualified] *indorsement*. Such a plea cannot be sustained without a violation of essential principles.”

Question 495: What is the rule of this case? What exceptions did the Court make?

(*Contra* to this case: *True v. Bullard*, 45 Nebr. 409.)

PART XVI

PROCEDURE TO FIX LIABILITY

(Except presentment for acceptance and protest. See Chapters 68 and 69.)

Chapter Sixty-three. Presentment for Payment.

Chapter Sixty-four. Notice of Dishonor.

CHAPTER SIXTY-THREE

PRESENTMENT FOR PAYMENT

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| § 352. Not necessary to charge party primarily liable. | § 358. Presentment must be to proper person. |
| § 353. Necessary to charge drawer and indorsers. | § 359. Presentment for payment not required when, and excused when. |
| § 354. Presentment must be at date of maturity. | § 360. Presentment for payment dispensed with when. |
| § 355. Presentment must be at proper place. | § 361. Making instrument payable at bank as order on bank to pay. |
| § 356. Presentment must consist in exhibition of instrument. | |
| § 357. Presentment must be at proper hour. | |

Sec. 352. Presentment for Payment Not Necessary to Charge Party Primarily Liable.

Case No. 496. Hyman v. Doyle, 103 N. Y. Suppl. 778.

GIEGERICH, J.: “* * * The only effect of qualifying a promise to pay by a mere specifying of a demand

at a fixed time and place is that if the debtor is ready with the money at that time and place, and no demand is made, he is exonerated from paying costs and interest for subsequent time, provided he keeps ready, pays the money into court when sued, and pleads these facts in his answer."

Question 496: (1.) A makes B a note for \$500 due one year from date. B does not present the note to A at its maturity, but presents it one year subsequently and then brings suit. Can A set up the failure to present the note to him when it matured? Can B collect interest for the two years? Could A in any way stop the accruing interest after the payment of the note?

(2.) What is the purpose of making a negotiable instrument payable at a particular place?

(Note: It is never necessary to present a note to the maker for payment at maturity in order to charge a liability upon him. This is true in respect to any party primarily liable. A tender of the amount due on the note to the holder, would stop accruing interest after maturity. The purpose of making an instrument payable at a particular place has its obvious advantages.)

Sec. 353. Presentment for Payment to Party Primarily Liable Necessary to Charge Parties Secondarily Liable.

(Note: See the following sections. The party secondarily liable is entitled to have the holder take certain steps to secure payment from the party primarily liable, who as between all parties ought to pay, in order to be in a position to apply for payment to indorser or drawer. The first of these is presentment to the party primarily liable for payment, on the proper day and in the proper manner.)

Sec. 354. Presentment for Payment in Order to Fix Liability of Parties Secondarily Liable Must be Date of Maturity. When Demand Paper Matures.

Case No. 497. Uniform Negotiable Instruments Act, Sec. 71.

"Where the instrument is not payable on demand presentment must be made on the day it falls due. Where

it is payable on demand, presentment must be made within a reasonable time after its issue, except that in the case of a bill of exchange, presentment for payment will be sufficient if made within a reasonable time after the last negotiation thereof."

Question 497: On what date must presentment for payment be made where the instrument is not payable on demand?

Case No. 498. *Columbian Bank. Co. v. Bowen*, 134 Wis. 218.

Facts: Suit against Bowen as the payee-indorser of a draft drawn by the Farmers & Merchant's Bank of Barron, Wisconsin, on the National Bank of North America, at Chicago, Illinois. It was payable on demand and dated and issued June 10, 1903. Defendant as the payee indorsed the draft to A. R. Tabbert, to whom it was forwarded by mail June 16, 1903, and received by him June 20th thereafter. He was at Spokane, temporarily, and on his way to San Francisco. On July 14, 1903, he indorsed and sold the draft to the Columbian Banking Co., the plaintiff in this suit. On the same day the draft was forwarded to the drawee bank for payment, which was refused, whereupon it was duly protested for non-payment by a notary public who forwarded a manifest thereof with notices of protest for Tabbert, the plaintiff and the defendant. Plaintiff on receiving the manifest and notices sent one to defendant at Barron, and one to the drawer. The drawer went into receivership and only a part of the draft was realized from the assets. Defense, that defendant was released from liability because of the period intervening between his parting with the draft and the presentation thereof to the drawee for payment.

MARSHALL, J.: "The primary question discussed by appellant's counsel, it is believed, is fully covered by the negotiable instrument law. There are a multitude of decisions regarding the character of a bill of exchange and that of a check, as those terms are used in business trans-

actions, and to what extent the incidents of one are identical with those of the other, which decisions are so variant in their phrasing of the matter as to produce more or less confusion in respect thereto with many apparent, and some real, conflicts, to remedy which was one of the principal objects of the law.

“To that end it was provided in sec. 1680, ‘A bill of exchange is an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to order or bearer,’ and it was further provided in sec. 1684-1, ‘A check is a bill of exchange drawn on a bank, payable on demand.’

“As to whether the incidents of the species of bills of exchange last mentioned are the same as those of bills of exchange generally, it was further provided in the section last referred to, ‘Except as herein otherwise provided, the provisions of this act applicable to a bill of exchange payable on demand apply to a check.’ The only exception referred to material to this case is contained in sec. 1684-2, in these words: ‘A check must be presented for payment within a reasonable time after its issue or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay.’”

“Keeping in mind that the discharge from liability above referred to because of unreasonable delay after the issuance of a check in presenting it for payment is of the drawer only, and that this action is against the payee who indorsed the instrument in question without qualification and put it in circulation, we turn to sec. 1678-1, which provides, as to a bill of exchange payable on demand, which from the foregoing obviously includes a check or draft on a bank of the character of the one in question, ‘presentment for payment will be sufficient if made within a reasonable time after the last negotiation thereof.’

“From the foregoing it seems plain that as regards the payee of such an instrument as we have here, who puts the same in circulation with his unqualified indorsement

thereon and all subsequent parties thereto, so indorsing the same, presentment for payment is sufficient, as regards their liability, if made within a reasonable time after the last negotiation. A bill of exchange payable on demand, regardless of its character, put in circulation, so long as its circulating character is preserved may be outstanding without impairing the liability of indorsers thereof. Formerly the length of time within which a bill of exchange might circulate without impairing such liability was more or less uncertain, rendering it very difficult to determine any one case by the decision in another. That difficulty was removed, so far as practicable, by the provision that only the time need be considered intervening between the last negotiation and the presentment. That is recognized as a radical change in the law as it formerly existed. Selover, Neg. Inst. Law, Sec. 195.

“As to an ordinary bill of exchange put in circulation, it was quite anciently held that the period between July 18th of one year and January 16th of the next year was not necessarily unreasonable. *Gowan v. Jackson*, 20 Johns. 176. Perhaps one might now keep a bill of exchange for such length of time as to destroy its circulating character notwithstanding he ultimately passed it along to another person, but that situation, as we view the case, does not exist here.

“Applying the law as aforesaid to the facts of this case it is readily seen that the delay in presenting the paper for payment between its date and the negotiation to the bank at San Francisco is immaterial. Appellant unqualifiedly indorsed the paper and put it in circulation by sending it to Tabbert at a distant part of the country, probably knowing that he was a traveler. Tabbert received the paper while journeying with the intention of going to San Francisco and held it till he arrived there and then negotiated it. It was promptly presented for payment thereafter and so in time, as regards that circumstance, to preserve the liability of appellant.

“The Court decided, as indicated, that Tabbert was a traveler with San Francisco as his destination and prop-

erly held that such circumstance sufficiently explained, if any explanation were necessary, the lapse of time between his reception of the paper and his negotiation thereof, preserving its circulating character and warranting the finding that the respondent came thereby in due course.

“The point is made that the instrument was not presented to the drawee for payment during banking hours. The negotiable instrument law at sec. 1678-2 provides that ‘Presentment for payment, to be sufficient, must be made: * * * at a reasonable hour on a business day * * *.’

The evidence shows that the paper, after taking its course through the clearing house, was presented to the drawee for payment on the afternoon of the same day between the hours of 3 and 6 o'clock. The proof is to the effect that such was the customary way of doing such business in Chicago, where the drawee was located. That is, as we understand it, the business day of the bank continued after the closing of the clearing-house transactions so as to enable banks, holding paper for collection, refused recognition in such transactions, to present the same for payment as was done in this case. That satisfies the statute. What constitutes business hours of a bank, within the meaning of the statute, has reference to the general custom at the place of the particular transaction in question. In case of a transaction occurring in a foreign jurisdiction, as in the instance in question, the Court cannot take judicial notice of what constitutes reasonable hours on a business day. 1 Daniel, Neg. Inst. (5th ed.) Sec. 601. It is a matter of proof, though in case of the notarial certificate of the transaction, as here, being regular so as to furnish *prima facie* proof that the paper was duly presented for payment, that raises the presumption that the presentment was made at a proper time. Cayuga Co. Bank v. Hunt, 2 Hill 635.

“By the Court.—*Judgment affirmed.*”

Question 498: (1.) Define a bill of exchange; a check. (2.) What is the exception to the rule that the law applicable to a bill of exchange is applicable to a check? (3.) To whom does this exception apply?

Case No. 499. Uniform Negotiable Instruments Act, Sec. 85.

“Every negotiable instrument is payable at the time fixed therein without grace. When the date of maturity falls upon Sunday, or a holiday, the instrument is payable on the next succeeding business day. Instruments falling due on Saturday are to be presented for payment on the next succeeding business day, except that instruments payable on demand may, at the option of the holder, be presented for payment before twelve o’clock noon on Saturday when the entire day is not a holiday.”

Question 499: (1.) What are days of grace? Are they abolished by the negotiable instruments act?

(2.) When an instrument falls due on Sunday or a holiday what is the rule?

(3.) When an instrument falls due on Saturday when is it to be presented for payment?

(Note: This section in some states has some amendments. A few states allow days of grace.)

Sec. 355. Presentment for Payment Must Be at Proper Place.

Case No. 500. Uniform Negotiable Instruments Act, Sec. 73.

“Presentment for payment is made at the proper place:

“1. Where a place of payment is specified in the instrument and it is there presented.

“2. Where no place of payment is specified and the address of the person to make the payment is given in the instrument and it is there presented.

“3. Where no place of payment is specified and no address is given and the instrument is presented at the usual place of business or residence of the person to make payment.

“4. In any other case, if presented to the person to make payment wherever he can be found, or if presented at his last known place of business or residence.”

Question 500: State what, under the varying circumstances, is the proper place for presentment for payment.

Case No. 501. Barnes v. Vaughn, 6 R. I. 259.

Facts: Suit against indorser. Defense, that proper procedure has not been taken to charge him in that no demand on the maker was made, at the proper place or in the proper manner. The facts were that the note not being payable at any certain place by its terms was left for collection at a certain bank, and the cashier of the bank sent a printed slip to the maker to come in and pay it.

BOSWORTH, J.: "The defense to this suit is that no legal and proper demand was made on the maker of the note; and that therefore the indorser who is here sued is discharged. The rule of the common law is that in order to charge the indorser demand must be made on the maker for payment on the very day on which the note becomes due. In case the note on its face is made payable at a particular place, as at a bank named, it is necessary, and only necessary, to make demand at such place; but if no place of payment is named in the note at which the note is payable, it is necessary to present the note to the maker personally or at his place of abode or business before the indorser can be made chargeable.

* * * "

Question 501:

Sec. 356. Presentment Must Consist in Exhibition of the Instrument.

(See case just preceding.)

Sec. 357. Presentment Must Be at Proper Hour.

(See *Columbian Bank. Co. v. Bowen*, 143 Wis. 218.)

Case No. 502. Uniform Instr. Act, Sec. 75.

“Where the instrument is payable at a bank, presentment for payment must be made during banking hours, unless the person to make payment has no funds there to meet it at any hour during the day, in which case presentment at any hour before the bank is closed on that day is sufficient.”

Question 502: (1.) If the instrument is not payable at a bank within what hours must presentment be made to be sufficient to charge parties secondarily liable? (See *Columbian Bank v. Bowen*, Case No. 498, *supra*.)

(2.) If it is payable at a bank, within what time must it be presented?

Case No. 503. German-American Bank of Rochester v. Milliman, 65 N. Y. Suppl. 242.

Facts: Suit by an indorsee on a note against the maker. The note was payable at Central Bank, whose banking hours were from 10 A. M. until 4 P. M. On the date of maturity the note was presented at the Central Bank and refused, because of no funds there to pay it. About 5 minutes to 4 Milliman deposited enough to pay the note, and then went to plaintiff, the German American Bank, and informed the cashier of that fact. The cashier informed him that the note had already gone to protest and he would have to pay the protest fees. Defendant refused and this a suit against him on the note for the amount thereof and protest fees and costs of suit.

Point Involved: Whether the party liable on an instrument has all of the day of maturity till the close of business hours or of banking hours if payable at a bank, to pay the instrument.

SUTHERLAND, J.: [After reviewing many authorities] “My conclusion is that the maker of this note in suit was allowed, by commercial usage, until 4 o’clock, to deposit at the Central Bank the money necessary to cover the note; and such deposit having been made 15 minutes be-

fore 4 o'clock, the maker is not in default. Although demand for the payment of the note was previously made, and the note protested for non-payment, the protest became of no avail on deposit of the amount of the note and interest, and the maker cannot be compelled to pay the protest fees thus incurred. I think this should be held to be the rule whether we regard the protest of the note earlier in the day as wholly bad or conditionally good,—good on condition that the maker did not, before the close of banking hours, fulfill his engagement by making his account good at the bank where the note was payable. * * * The judgment appealed from is therefore modified so that plaintiff shall recover of the defendant [the amount of the note with accrued interest and without protest fees or costs of suit].

Question 503: What were the facts in this case, the point in controversy and the Court's decision?

Sec. 358. Presentment Must Be to Proper Person.

Case No. 504. Uniform Negotiable Instruments Act, Secs. 76-78.

Sec. 76. Where the person primarily liable on the instrument is dead, and no place of payment is specified, presentment for payment must be made to his personal representative if such there be, and if with exercise of reasonable diligence, he can be found.

Sec. 77. Where the persons primarily liable on the instrument are liable as partners, and no place of payment is specified, presentment for payment may be made to any one of them, even though there has been a dissolution of the firm.

Sec. 78. Where there are several persons, not partners, primarily liable on the instrument, and no place of payment is specified, presentment must be made to them all.

Question 504: (1.) If the person primarily liable on the instrument is dead, what is the rule?

(2.) If the parties liable are partners, what is the rule?

(3.) If they are not partners?

Sec. 359. Presentment for Payment Not Required When and Excused When.

Case No. 505. Uniform Negotiable Instruments Act, Secs. 79, 80.

“Presentment for payment is not required in order to charge the drawer where he has no right to expect or require that the drawee or acceptor will pay the instrument.

“Presentment for payment is not required to charge an indorser where the instrument was made or accepted for his accommodation and he has no reason to expect the instrument will be paid if presented.”

Question 505: (1.) What is the rule expressed in Sec. 79?

(2.) A for B's accommodation in order to enable B to obtain money from C makes a note to B for \$500. B endorses this note to C. At maturity C makes no presentment to A. C afterwards sues B as indorser. Did the failure in making presentment at maturity lose C his remedy against B? Why?

Case No. 506. Uniform Negotiable Instruments Act, Sec. 81.

“Delay in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct or negligence. When the cause of delay ceases to operate, presentment must be made with reasonable diligence.”

Question 506: When is delay in making presentment excused?

Sec. 360. Presentment for Payment Dispensed With When.

Case No. 507. Uniform Negotiable Instruments Act, Sec. 82.

“Presentment for payment is dispensed with:

“1. When after the exercise of reasonable diligence presentment as required by this act can not be made.

“2. Where the drawee is a fictitious person.

“3. By waiver of presentment, express or implied.”

Question 507: When is presentment for payment dispensed with?

Case No. 308. *Bessenger v. Wenzel*, 125 N. W. 750 (Mich.).

Facts: The note in question was made by a corporation of which the indorsers were directors and managers, and they knew that the corporation had no money to pay the note and had assured the payee it could not be paid at maturity. Moore, J., held that the necessity for presentment for payment was dispensed with by implied waiver.

Question 508: What were the facts in this case and what did the Court hold?

Sec. 361. Making Instrument Payable at Bank as Order on Bank to Pay.

Case No. 509. Uniform Negotiable Instruments Act, Sec. 87.

“Where the instrument is made payable at a bank it is equivalent to an order on the bank to pay the same for the account of the principal debtor thereon.” (Omitted in Illinois and Nebraska law.)

Question 509: A makes a note payable at M bank. The holder presents it for payment. A has funds in the bank sufficient to cover the note. The bank pays the note and debits A's account. A had never said anything to the bank about the note. He has a defense to the note; and sues the M bank for paying without authority. Is the bank protected?

CHAPTER SIXTY-FOUR

NOTICE OF DISHONOR

§ 362. Notice of dishonor, its purpose, etc.

§ 363. Waiver of notice, not re-

quired when, delay in giving notice excused when, etc.

Sec. 362. Notice of Dishonor, Its Purpose, Etc.

Case No. 510. Uniform Negotiable Instruments, Act, Secs. 89-108.

“[Sec. 89.] Except as herein otherwise provided, when a negotiable instrument has been dishonored by non-acceptance or non-payment, notice of dishonor must be given to the drawer and to each indorser, and any drawer or indorser to whom such notice is not given is discharged.

“[Sec. 90.] The notice may be given by or on behalf of the holder, or by or on behalf of any party to the instrument who might be compelled to pay it to the holder, and who, upon taking it up, would have a right to reimbursement from the party to whom the notice is given.

“[Sec. 91.] Notice of dishonor may be given by an agent, either in his own name or in the name of any party entitled to give notice, whether that party be his principal or not.

“[Sec. 92.] Where notice is given by or on behalf of the holder, it inures for the benefit of all subsequent holders and all prior parties who have a right of recourse against the party to whom it is given.

“[Sec. 93.] Where notice is given by or on behalf of

a party entitled to give notice, it inures for the benefit of the holder and all parties subsequent to the party to whom notice is given.

“[Sec. 94.] Where the instrument has been dishonored in the hands of an agent, he may either himself give notice to the parties liable thereon or he may give notice to his principal. If he gives notice to his principal, he must do so within the same time as if he were the holder and the principal upon the receipt of such notice, has himself the same time for giving notice as if the agent had been an independent holder.

“[Sec. 95.] A written notice need not be signed, and an insufficient written notice may be supplemented and validated by verbal communication. A misdescription of the instrument does not vitiate unless the party to whom the notice is given is in fact misled thereby.

“[Sec. 96.] The notice may be in writing or merely oral and may be given in any terms which sufficiently identify the instrument and indicate that it has been dishonored by non-acceptance or non-payment. It may in all cases be given by delivering it personally or through the mails.

“[Sec. 97.] Notice of dishonor may be given either to the party himself or to his agent in that behalf.

“[Sec. 98.] Where any party is dead, and his death is known to the party giving notice, the notice must be given to a personal representative, if there be one, and if with reasonable diligence he can be found. If there be no personal representative, notice may be sent to the last residence or last place of business of the deceased.

“[Sec. 99.] Where the parties to be notified are partners, notice to any one partner is notice to the firm, even though there has been a dissolution.

“[Sec. 100.] Notice to joint parties who are not partners must be given to each of them, unless one of them has authority to receive such notice for the others.

“[Sec. 101.] Where a party has been adjudged a bankrupt or an insolvent, or has made an assignment for

the benefit of his creditors, notice may be given either to the party himself or to his trustee or assignee.

“[Sec. 102.] Notice may be given as soon as the instrument is dishonored, and unless delay is excused as hereinafter provided, must be given within the times fixed by this act.

“[Sec. 103.] Where the person giving and the person to receive notice reside in same place, notice must be given within the following times:

1. If given at the place of business of the person to receive notice, it must be given before the close of business hours on the day following.

2. If given at his residence, it must be given before the usual hours of rest on the day following.

3. If sent by mail, it must be deposited in the postoffice in time to reach him in the usual course on the day following.

“[Sec. 104.] Where the person giving and the person to receive notice reside in different places, the notice must be given within the following times:

1. If sent by mail, it must be deposited in the postoffice in time to go by mail the day following the day of dishonor, or if there be no mail at a convenient hour on that day by the next mail thereafter.

2. If given otherwise than through the postoffice, then within the time that notice would have been received in due course of mail, if it had been deposited in the postoffice within the time specified in the last subdivision.

“[Sec. 105.] Where notice of dishonor is duly addressed and deposited in the postoffice, the sender is deemed to have given due notice, notwithstanding any miscarriage in the mails.

“[Sec. 106.] Notice is deemed to have been deposited in the postoffice when deposited in any branch postoffice or in any letter box under the control of the postoffice department.

“[Sec. 107.] Where a party receives notice of dishonor, he has, after the receipt of such notice, the same time for giving notice to antecedent parties that the holder has after dishonor.

“[Sec. 108.] Where a party has added an address to his signature, notice of dishonor must be sent to that address; but if he has not given such address, then the notice must be sent as follows:

1. Either to the postoffice nearest to his place of residence, or to the postoffice where he is accustomed to receive his letters; or,

2. If he lives in one place and has his place of business in another, notice may be sent to either place; or,

3. If he is sojourning in another place, notice may be sent to the place where he is sojourning.

But where the notice is actually received by the party within the time specified in this act, it will be sufficient though not sent in accordance with the requirements of this section.”

Question 510: (1.) If a negotiable instrument is dishonored by non-acceptance, what is necessary in order to hold drawer and indorser?

(2.) By or on behalf of whom may the notice be given?

(3.) When the notice is given by or on behalf of the holder to whose benefit does it inure?

(4.) If given by any one else entitled to give notice, to whose benefit does it inure?

(5.) If the instrument is dishonored in the hands of an agent to whom may he give notice?

(6.) Need the notice be in writing? Need it be signed?

(7.) To whom may notice be given, in case of death of party? In case of notice to partnership? In case of parties, jointly named, but not partners? In case of notice to a bankrupt?

(8.) Within what time must notice be given?

(9.) Suppose notice is put in the post office and miscarries? Is the party for whom the notice was meant bound?

(10.) To what address must notice be sent?

Case No. 511. Thompson v. Williams, 14 Cal. 160.

Facts: The facts are stated in the opinion.

Points Involved: (1) What notice to an indorser is sufficient in substance; (2) Where the indorser sought to be held, indorsed after maturity, within what time demand on the maker must be made to hold the indorser?

COPE, J.: "This is an action on a promissory note by the holder against the maker and indorser. The note is dated January 5, 1857, and by its terms, became due on the following day. On the 26th of November, 1858, it was indorsed by the payee to the present holder, who, on the 29th of the same month, demanded payment of the maker, and on the same day, verbally notified the indorser of such demand, and that he would be held upon his indorsement. The question is as to the sufficiency of this notice.

"Mr. Justice Story, in his work on Promissory Notes (Section 348), in speaking of the form of the notice of dishonor to be given, or sent to the indorser, says: 'No precise form of words is necessary to be used upon such occasions. Still, however, it is indispensable that it should either expressly, or by just and natural implication, contain, in substance, the following requisites: 1. A true description of the note, so as to ascertain its identity. 2. An assertion that it has been duly presented to the maker at its maturity and dishonored. 3. That the holder, or other person, giving the notice, looks to the person to whom the notice is given for reimbursement and idemnity.'

"The notice, in this case, was substantially as follows: The plaintiff said to the defendant, Borland, the indorser, that he had demanded payment of that note, and desired to know what he intended to do about it. Borland replied that he was not liable to pay. The plaintiff then said that his name was upon it, and he should endeavor to make him liable; to which, Borland responded, that he had lost by the arrangement, and could not be held. The note was neither produced nor described, but the Court below found, as a fact, that the defendant knew what note was referred to, and this finding was authorized by the circumstances, and his language and conduct on the occasion.

"The object of the law in requiring a correct description of the note to be given in the notice to the indorser, is, that he may be put upon notice of the extent of his

liability, and placed in possession of the material facts necessary to enable him to secure the liability of others over to him, and his own reimbursement, upon payment of the note. The rule was not intended to subserve a technical purpose, but to promote substantial justice, and when it sufficiently appears that the indorser, at the time of receiving the notice, knew what particular piece of paper was referred to, and could not have been prejudiced by the failure to describe it, he cannot be permitted to object that his information was not communicated in a particular manner. This view was expressed by the Supreme Court of the United States in *Mills v. The Bank of the United States* (11 Wheat. 431). In that case, there was a misdescription of the date of the note, and it was contended that this defect in the notice was fatal to the right of recovery against the indorser. But the Court held that, under the circumstances, the notice was sufficient, and the following are among the reasons given for the decision: ‘Under these circumstances, the Court laid down a rule most favorable to the defendant. It directed the jury to find the notice good, if there was no other note, payable in the office at Chillicothe, drawn by Wood & Ebert, and indorsed by the defendant. If there was no other note, how could the mistake of date possibly mislead the defendant? If he had indorsed but one note for Wood & Ebert, how could the notice fail to be full and unexceptional in fact?’

“The other objections to the sufficiency of the notice are quite as easily disposed of. It was, of course, impossible for the plaintiff to show that the demand of payment was made at the maturity of the note, for it was indorsed to him long after it became due. He was required to make the demand, not on any particular day, but within a reasonable time, and it is not pretended that he is chargeable with a want of diligence. It is contended, however, that the time at which the demand was made, should have been stated, and that the omission to state it was a fatal defect in the notice. We do not think so. A demand at any time before the notice was suffi-

cient; and of this the indorser was as well advised as the plaintiff, for the facts were known to both, and the conclusion was purely a matter of law. There is no analogy between this case and the case of a note indorsed before it is due. In the latter case, the demand must be made on the day the notes matures, or the indorser will not be liable; and to fix his liability, the notice must show that the demand was made at the proper time. This is all that the case of *Wynn v. Alden* (4 Denio, 163), amounts to. This notice in that case, stated that the note was presented this day, and payment refused; but the notice was not dated, and it was held to be defective, because it was impossible to ascertain from the paper itself what particular day was intended. The Court intimated, however, that the defect might have been cured by the introduction of extraneous evidence.

“If much time had intervened between the demand and notice, the question might have arisen, whether the defendant was not by reason of the delay, released from liability. But we do not see how that question could have been determined by a reference to the notice itself; we are not aware of the existence of any rule of law, making the contents of a notice evidence of its service, or the fact of service a part of its contents.

“The other requisites, that the demand was made of the maker, that he refused to pay, and that the plaintiff looked to the defendant for reimbursement and indemnity, were sufficiently stated in the notice. Any other construction would be forced and unreasonable. The necessary inference from the statement, that payment was demanded is, that it was demanded of the person liable to pay, namely, the maker of the note. The fact of non-payment is shown by necessary implication in the declaration of the plaintiff, that he intended to look for payment to the defendant.

“It follows, that the notice to the defendant was sufficient, and the judgment of the Court below must be affirmed.—*Ordered accordingly.*”

Question 511: (1.) In what did the notice in this case consist? Was it sufficient? (2.) What were the facts in *Mills v. Bank*? Was the notice good in that case? (3.) Where the indorsement is made after the note was due, within what time must presentment for payment and notice of dishonor be made in order to hold such indorser?

Case No. 512. *Amer. Nat. Bk. v. Nat. Fertilizer Co., 125 Tenn. 328.*

Facts: Suit against the National Fertilizer Co. as indorser. Defense, among others, that no notice was given. The evidence as to this notice is given in the opinion.

Point Involved: Whether and under what circumstances notice by telephone is sufficient.

NEILL, J.: “* * * The complainant insists that notice was given. This is denied by defendant. The treasurer of the company, Mr. E. W. Connell, who made the indorsement for the fertilizer company, testifies unequivocally that no notice was received by him. Mr. Rhea, the president, testifies to the same effect. Mr. Le Seur, the cashier of the bank, says that he gave notice by telephone. According to Sec. 96 of the Negotiable Instruments Law, the notice may be ‘in writing or merely oral’ and may ‘in all cases be given by delivering it personally or through the mails.’ We are of opinion that a notice by telephone would fall within the meaning of this section, if it be clearly shown that the party to be notified was really communicated with; that is, fully identified as the party at the receiving end of the line. In this case, however, Mr. Le Seur is not clear that he ever held any communication with Mr. Connell. He testifies that his talks were with a clerk, whose name is not given; that he had several conversations with this clerk, in which he left word for Mr. Connell, and he *thinks* he succeeded one time in getting Mr. Connell. It is evident, however, in his testimony, that he is not confident in this belief, while Mr. Connell is positive he did not receive notice at all. It is said in Sec. 97 that notice of dishonor

may be given 'either to the party himself or his agent in that behalf.' We do not undertake to define the meaning of the expression 'agent in that behalf.' We are of opinion, however, that notice to a clerk, under the facts stated, would not be sufficient; it not appearing that he had communicated such notice to any one connected with the management of the business."

Question 512: (1.) Is notice of dishonor given by telephone sufficient? When?

(2.) Why in this case was the notice to the clerk not regarded as sufficient? Could not notice to a clerk be sufficient under certain circumstances without respect to whether he communicated the notice to any one else? What circumstances?

Case No. 513. First Nat. Bk. v. Miller, 139 Wis. 126.

Facts: Suit against defendant as indorser of a note. Defendant resided on a rural free delivery route and this was known to the holder. All mail with postage prepaid deposited before 9:25 A. M. reached defendant the same day. The note was dishonored on Saturday, February 24, 1906. Notice thereof, with insufficient postage was put in the mail the following Monday evening. This mail was returned to the sender for lack of postage. On the fifth day thereafter, between 6 and 8 P. M., the notice was again posted, properly addressed and stamped. Defendant refuses payment because he was not properly notified of dishonor.

Point Involved: The time within which notice of dishonor by mail must be given.

MARSHALL, J.: "* * * The law relating to proceedings to fix the liability of an indorser of a promissory note, in case of dishonor by the maker, was different in some states than in others, and for harmony on that as to time and manner of giving notice of dishonor to the indorser it was provided by Secs. 1678-34 of the Negotiable Instrument Statute that 'Where the person giving and the person to receive notice reside in differ-

ent places, the notice must be given * * * if sent by mail' by depositing it 'in the postoffice in time to go by mail the day following the day of dishonor, or, if there be no mail at convenient hour on that day, by the next mail thereafter.' Here notice was not sent till after time for mail on the first secular day after dishonor though there was ample opportunity to do so. The departure time for the mail was between 9 and 10 o'clock of such day. That was certainly a convenient time within the meaning of the statute. No excuse is found in the evidence for not depositing the notice with postage fully paid so as to have reached the respondent by such mail. The deposit on the evening of that day, after ordinary business hours and long after the closing of the mail for such day, as regards the route by which it must have been known the notice would reach respondent, if at all, clearly was too late. If that were not so, failure to prepay the postage so notice would go out by the next mail and failure to remedy the mistake after knowledge thereof for several days thereafter released the indorser beyond any possible question.

"By the Court.—*Judgment affirmed.*"

Question 513: Give the facts in this case showing why the indorser was discharged.

Case No. 514. Oakley v. Carr, 66 Nebr. 751, 60 L. R. A. 431.

Facts: Suit by one Oakley as indorsee of a note against Carr, as indorser. Defense that notice of dishonor was not given to Carr soon enough to fix his liability. The facts were that the note was made by one Anderson, of Seward, Nebraska, to Carr, who is a resident of Lincoln, Nebraska, and indorsed by Carr in blank to Oakley. It was deposited for collection with the First National Bank of Lincoln, which indorsed it "Pay any Bank or Banker on order," (signing it) and sent it to the bank at Seward. The maker of the note not being found the note was protested by a notary public, and on

the same day a notice of protest was sent to the maker, another to First National Bank of Lincoln, and another to John Carr, care of First National Bank of Lincoln, all of these notices being put in the postoffice on the date of maturity. This notice was forwarded to defendant Carr and reached him the following day.

Point Involved: Whether an indorser is notified in due time of dishonor to fix his liability to a subsequent indorser where the holder has in proper time notified the last indorser, and such indorser has within the time allowed for him to receive notice, notified the indorser whom he seeks to hold.

LOBINGIER, J.: “* * * At common law by the weight of authority, the indorser of a dishonored note or bill, was entitled to notice thereof on the day following the dishonor, if he resided in the same town with the maker; and if he resided elsewhere the notice was required to be posted by the first reasonable mail sent on the day following dishonor. * * *

“But the same law merchant which required the notice of dishonor to be given or sent on the day following non-payment also limited the duty of the holder or protesting officer in this regard to a notification of the last indorser, who in turn was allowed an additional day to send notice to the indorser immediately preceding him, and so on until all had been notified; 3 Randolph, Com. Paper, Sec. 1261. Thus in the case before us the notary was not legally bound to notify Carr at all. It would have been sufficient had he simply sent the one notice to the First National Bank, which was the last indorser, and the latter would have had until the following business day to notify Carr. As the bank received its notice on Saturday, it would, under this rule, have until the following Monday to send its notice to defendant in error, for in such cases the intervening Sunday is not to be counted. *Eagle Bank v. Chapin*, 3 Pick. 180; *Agnew v. Bank of Gettysburg*, 2 Harr. & G. 478; and many cases cited in 7 Century Dig. Sec. 1169.

“It is claimed, however, that this doctrine should not be applied to a case like this, where the last indorser had received and indorsed the note simply for collection. It will be remembered that the indorsements themselves were not such as to disclose that the Lincoln Bank was an indorsee for collection only. Carr had indorsed the note in blank, and the Lincoln Bank had indorsed it merely so that its correspondent might collect, and there was nothing to indicate to the notary but that the Lincoln Bank was the holder as well as the last indorser. But aside from this, no authority is cited for the exception contended for by plaintiff in error in the case of indorsers who hold for collection only. On the other hand, there is ample support for the proposition that it is sufficient to notify such indorsers in the same way as other last indorsers are notified, and that prior indorsers may be held by virtue of the usual notice from them. *Carmena v. Bank of Louisiana*, 1 La. Ann. 369; *Eagle Bank v. Hathaway*, 5 Met. 212; *Brown v. Ferguson*, 4 Leigh, 39, 24 Am. Dec. 707; *Linn v. Horton*, 17 Wis. 151; 3 *Randolph*, Com. Paper, Secs. 1241, 1262. *Boyer v. Richardson*, 52 Neb. 156, 71 N. W. 981, cited by defendant in error, in no way conflict with the foregoing. The Court there was simply considering the effect of an indorsement for collection on the title to a note, and held that such an indorsee acquired no right of action against a prior indorser.

“But it is contended that the ‘First National Bank has never so notified Carr. * * * They simply attended to the courtesy of seeing that Carr finally got a letter that was sent to them in their care, without even knowing its contents.’ If it had developed that the letter which the bank delivered to Carr by its messenger was not in fact a notice of dishonor, and none other had been sent, he, of course, would have been released from liability. In taking the course it did, the bank might have been assuming some risk, though it must be remembered that its agent claimed to have mailed a separate letter to Carr, and testified that it was their custom, out of ample

caution, to adopt in such cases both methods of notification. But since the letter delivered to Carr was complete and sufficient notice of dishonor, we are unable to see how it can profit defendant in error that it was not actually prepared by the clerks or officers of the Lincoln Bank. The latter had a right to employ such agencies as it saw fit, both in the preparation, and delivery of the notice."

Question 514: C, the holder of a note, presents it to M, the maker, on the date of its maturity and M refuses payment. A and B are indorsers thereon in the order named. M notifies B in the time allowed; how long has B to notify A in order to hold him?

Sec. 363. Waiver of Notice, Not Required When, Delay in Giving Notice Excused When, Etc.

Case No. 515. Uniform Negotiable Instruments Act, Secs. 109-118.

"[Sec. 109.] Notice of dishonor may be waived, either before the time of giving notice has arrived, or after the omission to give due notice, and the waiver may be express or implied.

"[Sec. 110.] Where the waiver is embodied in the instrument itself, it is binding upon all parties; but where it is written above the signature of an indorser, it binds him only.

"[Sec. 111.] A waiver of protest, whether in the case of a foreign bill of exchange or other negotiable instrument, is deemed to be a waiver not only of a formal protest, but also of a presentment and notice of dishonor.

"[Sec. 112.] Notice of dishonor is dispensed with when after the exercise of reasonable diligence, it cannot be given to or does not reach the parties sought to be charged.

"[Sec. 113.] Delay in giving notice of dishonor is excused when the delay is caused by circumstances beyond the control of the holder and not imputable to his

default, misconduct or negligence. When the cause of delay ceases to operate notice must be given with reasonable diligence. •

“[Sec. 114.] Notice of dishonor is not required to be given to the drawer in either of the following cases:

1. Where the drawer and drawee are the same person.
2. Where the drawee is a fictitious person or a person not having capacity to contract.
3. Where the drawer is the person to whom the instrument is presented for payment.

4. Where the drawer has no right to expect or require that the drawee or acceptor will honor the instrument.

5. Where the drawer has countermanded payment.

“[Sec. 115.] Notice of dishonor is not required to be given to an indorser in either of the following cases:

1. Where the drawee is a fictitious person or a person not having capacity to contract and the indorser was aware of the fact at the time he indorsed the instrument.
2. Where the indorser is the person to whom the instrument is presented for payment.

3. Where the instrument was made or accepted for his accommodation.

“[Sec. 116.] Where due notice of dishonor by non-acceptance has been given, notice of a subsequent dishonor by non-payment is not necessary, unless in the meantime the instrument has been accepted.

“[Sec. 117.] An omission to give notice of dishonor by non-acceptance does not prejudice the rights of a holder in due course subsequent to the omission.

“[Sec. 118.] Where any negotiable instrument has been dishonored it may be protested for non-acceptance or non-payment, as the case may be, but protest is not required except in the case of foreign bills of exchange.”

Question 515: May notice of dishonor be waived? May the waiver be implied? May it be before or after the notice should have been given?

(2.) If the waiver is embodied in the instrument does it operate against all indorsers?

(3.) If the party "waives protest," of what else is this a waiver?

(4.) When is delay in giving notice excused?

(5.) When is notice of dishonor not required: (a) to be given drawer? (b) to be given indorser?

(6.) Is protest required in case of promissory notes and inland bills? Upon what instrument is protest absolutely essential? May it be given in other cases?

Case No. 516. Gove et al. v. Vining, 7 Metc. (Mass.) 212.

Suit by indorsees against the indorser on a promissory note. Defense, that notice of dishonor was not given. The facts were that the note was made by Alexander Vining to Polly Vining and indorsed by Polly. The present holder sent a demand on the maturity of the note, to Alexander as maker to pay the note. The messenger did not see Alexander, but handed the notice to Polly, who read it, and then requested that there be no suit on the note until Alexander could go down and see the holder about it.

Point Involved: What amounts to an implied waiver by an indorser of presentment for payment and notice of dishonor.

SHAW, C. J.: " * * * the Court are of opinion that when the indorser, shortly before the time when the note becomes due, says to the holder that an arrangement for its payment is about being made, and in direct terms or by reasonable implication, requests the holder to wait or give time, it amounts to an assurance that the note will be paid—that the promisor or indorser will pay it—and is a waiver of demand and notice. It tends to put the holder off his guard, and induces him to forego making a demand at the proper time and place; and it would be contrary to good faith to set up such want of demand and notice—caused perhaps by such forbearance—as a ground of defense. * * *"

Question 516: State this case.

PART XVII

DISCHARGE OF PAPER AND PARTIES THEREON

CHAPTER SIXTY-FIVE

DISCHARGE OF NEGOTIABLE PAPER

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| § 364. How negotiable paper discharged. | § 367. Renunciation of rights. |
| § 365. Discharge of person secondarily liable. | § 368. Discharge by cancellation or alteration. |
| § 366. Not discharged by payment by party secondarily liable. | |

Sec. 364. How Negotiable Paper Discharged.

Case No. 517. Uniform Negotiable Instruments Act, Sec. 119.

“A negotiable instrument is discharged:

“1. By payment in due course by or on behalf of the principal debtor.

“2. By payment in due course by the party accommodated, where the instrument is made or accepted for accommodation.

“3. By the intentional cancellation thereof by the holder.

“4. By any other act which will discharge a simple contract for the payment of money.

“5. When the principal debtor becomes the holder of the instrument at or after maturity in his own right.”

Question 517: Enumerate the various ways in which a negotiable instrument may be discharged.

Sec. 365. Discharge of Persons Secondarily Liable.

Case No. 518. Uniform Negotiable Instruments Act, Sec. 120.

"A person secondarily liable on the instrument is discharged:

"1. By an act which discharges the instrument.

"2. By the intentional cancellation of his signature by the holder.

"3. By the discharge of a prior party.

"4. By a valid tender of payment made by a prior party.

"5. By a release of the principal debtor, unless the holder's right of recourse against the party secondarily liable is expressly reserved, or unless the principal debtor be an accommodating party.

"6. By any agreement binding upon the holder to extend the time of payment, or to postpone the holder's right to enforce the instrument, unless made with the assent of the party secondarily liable, or unless the right of recourse against such party is expressly reserved."

Question 518: Enumerate the various ways in which a person secondarily liable is discharged.

Sec. 366. Not Discharged by Payment by Party Secondarily Liable.

Case No. 519. Uniform Negotiable Instruments Act, Sec. 121.

"Where the instrument is paid by a party secondarily liable thereon, it is not discharged; but the party so paying it is remitted to his former rights as regards all prior parties, and he may strike out his own and all subsequent indorsements, and again negotiate the instrument, except:

"1. Where it is payable to the order of a third person and has been paid by the drawer; and,

"2. Where it was made or accepted for accommodation, and has been paid by the party accommodated."

Question 519: State the provisions of this section.

Sec. 367. Renunciation of Rights.

Case No. 520. Uniform Negotiable Instruments Act, Sec. 122.

“The holder may expressly renounce his right against any party to the instrument before, at, or after its maturity. An absolute and unconditional renunciation of his rights against the principal debtor made at or after the maturity of the instrument, discharges the instrument. But a renunciation does not affect the rights of a holder in due course without notice. A renunciation must be in writing, unless the instrument is delivered up to the person primarily liable thereon.”

Question 520: To constitute a renunciation of rights, what is necessary?

Case No. 521. *In re George* (1890), 4 Ch. D. 627.

Facts: M. A. Francis gave her note for £2,000 to F. W. George, now deceased. Some hours before his death George directed the promissory note to be brought to him that he might destroy it. The note could not be found. George then sent for the nurse and told her he could not find the note, but that he wished to forgive the debt, and made the nurse promise she would destroy the note, and that she would testify that it was George's wish that it should be destroyed, and that she should write this down. Thereupon the nurse wrote this memorandum: “30th August, 1889. It is by Mr. George's dying wish that the cheque for £2,000 money lent to Mrs. Francis be destroyed as soon as found. Mr. George is perfectly conscious and in his sound mind. (Signed) Nurse T.” After George's death the note was found by the executors, and this is a proceeding to determine whether it has been cancelled.

Point Involved: What amounts to a legal renunciation of rights upon a negotiable instrument.

CHITTY, J.: “* * * Then comes the question, whether there is a ‘renunciation’ ‘in writing’ within Sec. 62, Sub-Sec. 1. I entertain no doubt of the integrity and trustworthiness of the witnesses, and I entertain no doubt also that it was the testator’s intention to forgive, or discharge this note in favour of the plaintiff. I am quite satisfied with the evidence on this point. Sec. 62, Sub-Sec. 1, says the renunciation must be in writing, unless the bill is delivered up to the ‘acceptor,’ and, changing the language to suit the present case, that would be, unless the note is delivered up to the maker. The statute contains provisions for the cancellations of bills of exchange, and, therefore, of promissory notes also. So that it is quite clear, that if this note had been in the testator’s possession at the time, he would have had it destroyed: upon that point I entertain no doubt. I have, however, to deal with the statute, which is not confined, of course, to cases such as this, but is a statute as to bills of exchange, and has a wide operation among mercantile men; and I feel that I must be on my guard not to allow any sympathy I may have with the plaintiff on the facts of the case in any way to influence my judgment in construing this section; because I might, if I did give way on such a ground as that, be inflicting considerable injury upon merchants and others.

“Now, it is plain that what must be in writing is an absolute and unconditional renunciation of rights. It is not necessary to put those words in; but that must be the effect of the document. Then the document is not to be a note or memorandum of the renunciation or of an intention to do it, but it must be itself the record of the renunciation. I am not called upon to say whether the words, ‘the renunciation must be in writing,’ involves the signature; and I do not propose to say anything which would tend to shew it was my opinion that the renunciation in writing need not be signed. I see great danger in holding that the signature is not required. I leave the point wholly undetermined. This section, as has been properly pointed out, does not, in terms, say that the

writing must be signed by the holder of the bill or note; and it does not, in terms, say that the writing may be signed by anybody on his behalf—that is, by an agent; and, no doubt, there are other sections where signature is spoken of, and it must be the signature of the person himself, or there may be cases where it is signed by the agent, and provisions are made to that effect in the statute.

“But now I take the document which I have before me, and compare it with the statute. The facts are these. [His Lordship then stated the facts as to the writing of the memorandum by the nurse, and continued]: That memorandum was, no doubt, meant to be evidence of his intention. The document is signed by the nurse, and it was an authority to those concerned, if the note had been found, to destroy it in his lifetime.

“But is that an absolute and unconditional renunciation in writing of the testator’s rights on the note? Mr. Romer’s argument (to put it shortly) was this, that it is final because it is stated it is Mr. George’s dying wish, and that it is immediate because the note was to be destroyed as soon as found. But the real question, I think, is this: is the direction to destroy the note as soon as found an absolute and unconditional renunciation of the rights on the note? I put the proposition in that way; for I think it is the fairest way to state it in favour of the plaintiff. I am now assuming that this is a writing by the testator—an assumption that I am making in favour of the plaintiff.

“The pertinent question is, could not the testator, after this paper had been signed by the nurse, have gone to the bank, if he recovered, where he supposed the note to be, to get it, or if it was found afterwards and brought to the testator, could he not say, ‘I have changed my mind’? I think he could. I think I am bound in point of law to say that he could.

“Having examined the case with all the care that I think could be given to it, I am unable to come to the conclusion that this was an absolute and unconditional

renunciation in writing such as is required by the statute."

Question 521: Why was not the writing by the nurse in this case considered a renunciation?

Sec. 368. Discharge by Cancellation or Alteration.

(See also Case No. 485, *supra*.)

Case No. 522. Uniform Negotiable Instruments Act, Secs. 123, 124, 125.

"[Sec. 123.] A cancellation made unintentionally, or under a mistake, or without the authority of the holder, is inoperative; but where an instrument or any signature thereon appears to have been cancelled, the burden of proof lies on the party who alleges that the cancellation was made unintentionally, or under a mistake or without authority.

"[Sec. 124.] Where a negotiable instrument is materially altered by the holder without the assent of all parties liable thereon, it is avoided except as against a party who has himself made, authorized or assented to the alteration and subsequent indorsers.

"But when an instrument has been materially altered and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor.

"[Sec. 125.] Any alteration which changes:

"1. The date.

"2. The sum payable, either for principal or interest.

"3. The time or place of payment.

"4. The number and the relations of the parties.

"5. The medium of currency in which payment is to be made.

"Or which adds a place of payment where no place of payment is specified, or any other change or addition which alters the effect of the instrument in any respect, is a material alteration."

Question 522: (1.) If a cancellation is made unintentionally, what is the effect?

(2.) What presumption is made as to such cancellation?

(3.) When an instrument is materially altered what result follows:

(4.) Can suit be brought on it in its original form: (a) by the party altering it; (b) by a holder in due course?

(5.) What alterations are considered material?

Case No. 523. Moskowitz v. Deutsch et al., 92 N. Y. Supp. 921.

Facts: The facts are stated in the opinion.

Point Involved: The effect of alteration on the rights of an innocent holder.

O'GORMAN, J.: "The defendants make a check to one Goldberg under date of September 2d. On the following day the payee represented to the defendants that he had lost this check, whereupon payment thereof was stopped at the bank, and five or six days later he received from the defendants another check for the same amount, which was duly cashed. A day or two after September 12th, the original check of September 2d with a '1' inserted before the '2,' making the date September '12,' was indorsed over to the plaintiff by Goldberg, and cashed. The plaintiff now sues the drawers, and the defense is a general denial and forgery. That the date of this check had been altered by Goldberg, or at his instance, is too clear for dispute. Such an alteration is material, constitutes forgery, and destroys the validity of the check, except as provided by Sec. 205 of the Negotiable Instruments Law (Laws 1897, p. 745, c. 612), which declares that, 'when an instrument has been materially altered and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor.' If it be assumed, therefore, as the Court below has found, that the plaintiff is an innocent holder for value in due course, he may assert such rights as are conferred by the check as it was before the alteration. We then have a case where a check

dated September 2d is cashed by the plaintiff and presented for payment more than 10 days thereafter. As all the parties resided, and the bank was situated, in the city of New York, the delay in the presentment of the check was unreasonable, and was sufficient to discharge the defendants as drawers from liability thereon to the extent of the loss, if any, incurred by them in consequence of the delay. But the only way in which a drawer of a check can be exposed to injury by such delay is where the bank becomes insolvent subsequent to the delivery of the check and prior to its presentment. (Eaton & Gilbert on Commercial Paper, 630, and cases cited; Andrus v. Bradley [C. C.] 102 Fed. 54, affirmed 107 Fed. 196, 46 C. C. A. 238, 53 L. R. A. 432). The loss suffered by the defendants must be attributed not to delay in the presentment of the check, but to their imprudent reliance on the false and fraudulent representations of the payee. Before giving the new check, the defendants might have insisted upon full indemnity from Goldberg, and thus escaped the loss of which they now complain. By their conduct, Goldberg found it possible to perpetrate a fraud, and the consequences of their misplaced confidence in him should be borne by them, and not visited upon the plaintiff, an innocent party to the transaction. Upon the facts, the plaintiff was entitled to judgment.—*Judgment affirmed with costs.*”

Question 523: What was the alteration in this case? Why was the plaintiff allowed to recover?

PART XVIII

BILLS OF EXCHANGE PARTICULARLY CONSIDERED

Chapter Sixty-six.	Definitions and General Provisions.
Chapter Sixty-seven.	Acceptance.
Chapter Sixty-eight.	Presentment for Acceptance.
Chapter Sixty-nine.	Protest.
Chapter Seventy.	Acceptance and Payment for Honor.
Chapter Seventy-one.	Bills in a Set.

CHAPTER SIXTY-SIX

DEFINITIONS AND GENERAL PROVISIONS

§ 369. Bills of exchange defined.	§ 373. When bill may be treated as note.
§ 370. Bill not an assignment.	§ 374. Referee in case of need.
§ 371. Joint drawees.	
§ 372. Bills inland and foreign.	

Sec. 369. Bills of Exchange Defined.

Case No. 524. Columbia Bank Co. v. Bowen.
(Set out as Case No. 498, *supra*.)

Question 524: Define "bill of exchange."

Sec. 370. Bill Not an Assignment.

(See also *Ballen & Friedman v. Bank*, *post*, Case No. 530.)

Case No. 525. *B. & O. R. Co. v. First Nat. Bk.*, 102 Va. 753.

KEITH, P. (quoting from the Negotiable Instruments Act): " 'A bill of itself does not operate as an assignment of funds in the hands of the drawee available for the payment thereof, and the drawee is not liable on the bill unless and until he accepts the same.' * * * The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer. The acceptance must be in writing and signed by the drawee. It must not express that the drawee will perform his promise by any other means than the payment of money.' "

Question 525: A draws on B to the order of C. B has funds to A's credit and an agreement with A that he will accept A's drafts, but he refuses to accept or pay the draft to C's order. Has C any rights against B? What are his rights on the unaccepted bill?

Sec. 371. Joint Drawees.

Case No. 526. Uniform Negotiable Instruments Act, Sec. 128.

"A bill may be addressed to two or more drawees jointly, whether they are partners or not; but not to two or more drawees in the alternative or in succession."

Question 526: State the provisions of this section.

Sec. 372. Bills Inland and Foreign.

Case No. 527. Uniform Negotiable Instruments Act, Secs. 126, 129.

“An inland bill of exchange is a bill which is, or on its face purports to be, both drawn and payable within this state. Any other bill is a foreign bill.”

Question 527: Define a foreign and an inland bill of exchange.

Sec. 373. When Bill May Be Treated as Note.

Case No. 528. Uniform Negotiable Instruments Act, Sec. 130.

“Where in a bill, drawer and drawee are the same person, or where the drawee is a fictitious person, or a person not having capacity to contract, the holder may treat the instrument at his option, either as a bill of exchange or promissory note.”

Question 528: State the rule of this section.

Sec. 374. Referee in Case of Need.

Case No. 529. Uniform Negotiable Instruments Act, Sec. 132.

“The drawer of a bill and any indorser may insert thereon the name of a person to whom the holder may resort in case of need, that is to say, in case the bill is dishonored by non-acceptance or non-payment. Such person is called the referee in case of need. It is in the option of the holder to resort to the referee in case of need or not, as he may see fit.”

Question 529: Who is a referee in case of need? For what purpose is he named?

CHAPTER SIXTY-SEVEN

ACCEPTANCE

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|---|--|
| § 375. Acceptance defined. | § 379. At what stage bill may be accepted. |
| § 376. To be written on face of bill. | |
| § 377. Where not written on bill. | § 380. General or qualified acceptance. |
| § 378. Drawee has 24 hours for decision. Retention as acceptance. | |

Sec. 375. Acceptance Defined.

Case No. 530. Ballen & Friedman v. Bank of Krenlin, 130 Pac. Rep. 539 (Okla.).

Facts: Suit by Mike Ballen & Dave Friedman, a partnership, against Bank of Krenlin. Plaintiff's case was that certain checks had been offered them as cash items and they had inquired of the defendant as the bank on which said checks were drawn, whether said checks were good, that the bank had responded that they were and that plaintiffs had therefore accepted them. On demurrer to petition.

Point Involved: Whether an oral statement by the drawee of a check that the same is good, in response to an inquiry by one in whose favor such checks are drawn and who relies on the information before receiving them, gives the holder any right against the bank on the check. Generally, what constitutes an acceptance?

ROSSER, C.:

"This transaction occurred after the act of March 20, 1909 (Laws 1909, c. 24), commonly called the Negotiable

Instruments Law, had become the law in this state. Section 185 of that act is as follows: 'A check is a bill of exchange drawn on a bank on demand. Except as herein otherwise provided, the provisions of this act applicable to a bill of exchange payable on demand apply to a check.' Section 132 of the act is as follows: 'The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer. The acceptance must be in writing and signed by the drawee. It must not express that the drawee will perform his promise by any other means than the payment of money.'

"It is contended by the plaintiffs that, as they were informed, by the defendant's cashier, that the check was good and acted upon that information, the bank is estopped to deny liability, and is responsible for the amount of the checks. As a general proposition of law, as applied to ordinary transactions, the plaintiff is undoubtedly correct; but the question here is whether the ordinary principles of law in this regard apply to negotiable instruments, including bank checks. It is believed that they do not apply, at least in the absence of actual fraud, which is not alleged in this case. The Negotiable Instruments Law was intended to fix and settle the rights of the parties, so far as they are affected by its operation. *Columbian Banking Company v. Bowen*, 134 Wis. 218, 114 N. W. 451. Section 132 of that law, quoted above, provides that the acceptance of a bill of exchange must be in writing. Section 185, quoted above, provides that checks shall be governed by the same rules as bills of exchange. Section 189 provides that a check of itself does not operate as an assignment of any part of the funds to the credit of the drawee with the bank, and that the bank is not liable, unless and until it accepts or certifies the check. The oral statement that the checks were good was not a lawful acceptance, as required by the statute. Neither was it a certification, because a certificate means a declaration in writing, and a certificate must be in writing. * * *

"The equitable grounds under which plaintiffs seem

to be strong; but a consideration of all the facts show that, even on equitable grounds, the bank is entitled to consideration. Suppose that, when asked about the checks, the drawer had to his credit in the bank an amount sufficient to pay them. The bank would naturally answer that the checks were good. They were good as the account then stood; and if other checks, sufficient to reduce the balance below the face of those in controversy, had not come in before they were presented, they would have been paid. If no other checks had been issued, the bank would have done the drawer a grave injustice if it had answered that the checks were not good. Then, after giving out the information, suppose other checks had been presented. Under section 189 of the Negotiable Instruments Law, the giving of the checks in suit did not operate as an assignment of any part of the drawer's fund. The bank could not refuse to pay other checks that were presented. The checks sued on had not been certified. The bank would have been liable to any person presenting a check, unless they paid it. It is clear that to require the bank to pay these checks would be to make it responsible for having told the checks were good, without any fraudulent intention, and at a time when its books showed they were good. The inquiry was made concerning the checks as such; and there is nothing in the petition to indicate that either the plaintiffs or the bank had in mind anything except the status of the drawer's account, and certainly no contract, equitable or otherwise, except as contained in the checks was contemplated by the parties.

Question 530: (1.) State the facts, the question presented and the Court's decision.

(2.) Suppose when the inquiry had been made the bank had no funds of the drawer on deposit and knew the checks were not good and made the statement fraudulently, would the holder taking the bills on the faith of such statement have a case? (See *Van Buskirk v. State Bank of Rocky Ford*, 35 Colo. 142, 83 Pac. 778.)

Sec. 376. Acceptance to Be Written on Bill.

Case No. 531. Uniform Negotiable Instruments Act, Sec. 133.

“The holder of a bill presenting the same for acceptance may require that the acceptance be written on the bill, and, if such request is refused, may treat the bill as dishonored.”

Question 531: In what form is the holder entitled to have acceptance made? If such form of acceptance is refused, what right has the holder? Who could he then sue?

Sec. 377. Where Acceptance Not Written on Bill.

Case No. 532. Uniform Negotiable Instruments Act, Secs. 134, 135.

“Where an acceptance is written other than upon the bill itself, it does not bind the acceptor except in favor of a person to whom it has been shown and who on the faith thereof receives the bill for value.

“An unconditional promise in writing to accept a bill before it is drawn is deemed an actual acceptance in favor of every person who, upon the faith thereof, receives the bill for value.”

Question 532: State the provisions of these paragraphs.

Sec. 378. Drawee Has 24 Hours for Decision—Retention as Acceptance.

Case No. 533. *Wisner v. First Nat. Bank of Gallitzin*, 220 Pa. 21, 17 L. R. A. (N. S.) 1266.

Facts: Sam'l R. Bullock drew six checks on the defendant bank in favor of Charles W. Gallaer, Jr., who deposited them in the plaintiff bank in New York City which credited them to Gallaer's account. The first check was dated December 27, 1904, and the last January 3,

1905. The plaintiff bank sent these checks to the defendant bank. On the day they were received, the defendant bank (on which said checks were drawn) handed the several checks to a notary public usually employed by it, for the purpose of protest, and he held them without protesting them or giving notice of dishonor. Several days later, the checks were returned to the banks through whom they were sent to the defendant bank for collection. The plaintiff bank brings suit against the defendant bank to recover the amount of the checks on the ground that the drawee bank, the defendant, had accepted the checks by its refusal and failure to return them within 24 hours after their receipt as required by the Negotiable Instruments Law. The defendant claims that it is relieved from liability on the checks because it had refused to accept them and had on the day of their receipt delivered them to a notary public for protest and dishonor.

Point Involved: Whether the drawee of a check (or bill) to whom such check (or bill) is sent for acceptance, is to be deemed an acceptor upon his refusal to return the check (or bill) within 24 hours of receiving it.

MESTREZAT, J.: "We come now to the principal and controlling question in the case, and that is whether the failure to return the checks to the holder or the collecting bank within twenty-four hours after their delivery to the defendant was a refusal to return the checks within the meaning of sec. 137 of the act; or did the act contemplate a tortious refusal to return, amounting to a conversion of the checks, as claimed by the defendant and as held by the Court below? The drawee to whom a bill is delivered for acceptance is deemed or taken to have accepted it under this section of the act (a) where he destroys it; (b) where he refuses within twenty-four hours after delivery to return the bill, accepted or nonaccepted, to the holder; and (c) where he refuses, within such other period as the holder may allow, to return the bill, accepted or nonaccepted, to the holder. When either of these conditions exists, the drawee becomes an acceptor

of the bill, and assumes liability as such. An implied or a verbal acceptance of a bill is abolished by the act, and there are now only two modes of accepting a bill: (1) By writing, signed by the drawee, as provided in sec. 132; and (2) by a nonreturn of the bill, which is declared by the section under consideration to be the equivalent of an acceptance. The manifest purpose in requiring the prompt return of the bill is in the interest of and for the protection of the holder. It is immaterial to the drawer when the bill is returned, as he is protected by notice of dishonor; and hence this section of the act requiring prompt action in returning the bill was obviously enacted for the benefit of the holder of the bill. The act declares in sec. 136 that twenty-four hours is sufficient time for the drawee to decide whether or not he will accept the bill, and, the section under consideration having allowed this time, it requires him to return the bill accepted or nonaccepted. If a demand and refusal are conditions precedent to an acceptance under this section, then the holder must not only present the bill for acceptance, but he must make a demand for its acceptance, and await a specific refusal before the drawee is deemed an acceptor. This would certainly not be to the convenience or the interest of the holder, but in direct opposition to both. It would afford the holder less protection, and would in effect prevent the return of the bill within twenty-four hours; or it would require the holder, in transmitting the bill with instructions to present it for acceptance, to send at the same time a demand for its acceptance. It is obvious that such demand accompanying a presentation of a bill for acceptance is wholly unnecessary, and certainly was not in contemplation of the legislature in enacting the section. The presentation of a bill for acceptance is a demand for its acceptance, which, if the bill is retained by the drawee, implies a demand for its return if acceptance is declined, in contemplation of the negotiable instruments law. The purpose of presenting a bill of exchange to the drawee is to require him to accept and assume liability for its payment, or to re-

fuse its acceptance, and thereby avoid liability. When the bill is presented, action by the drawee is therefore demanded of him, and he cannot remain silent and inactive without incurring the statutory penalty prescribed for such conduct. If he is permitted to retain the bill, he must return it accepted or not accepted at the expiration of twenty-four hours. If he accepts, he is required to do so in writing, and must return the bill. If he refuses, he must return the bill not accepted. If he fails to do either—return it accepted or not accepted—he is ‘deemed to have accepted the bill’ under this section of the act, and is liable thereon to the holder. It is apparent, we think, that in the enactment of this section of the statute the legislature regarded the presentation of acceptance as a demand for an acceptance, which, when the bill is retained by the drawee, implies a demand for its return within the time specified, and that, therefore, the neglect or failure to return is a refusal to return the bill. As said by this Court in *First Nat. Bank v. McMichael*, *supra*, if a bank does not pay or accept a check, it is bound to refuse it. And this is more clearly disclosed as the true interpretation of the word ‘refuses’ in this connection, when we consider that the consequences to the holder of the nonreturn of the bill are the same whether it follows a demand, additional to the presentation for acceptance and a refusal, or simply a neglect or failure to return after the demand implied by its presentation for acceptance. If the section has in view the protection of the holder, as it manifestly has, then it was evidently the intention of the legislature that the nonreturn of the bill within the specified time, regardless of the clause, will make the drawee an acceptor.”

Question 533: (1.) If a bill is sent to a drawee for acceptance, and he merely refuses to return the bill, is that in itself at the expiration of any period deemed acceptance?

(2.) In what two ways is acceptance made?

Sec. 379. At What Stage Bill May Be Accepted.

Case No. 534. Uniform Negotiable Instruments Act, Sec. 138.

“A bill may be accepted before it has been signed by the drawer, or while otherwise incomplete, or when it is overdue, or after it has been dishonored by a previous refusal to accept, or by non-payment. But when a bill payable after sight is dishonored by non-acceptance and the drawee subsequently accepts it, the holder, in the absence of any different agreement, is entitled to have the bill payable accepted as of the date of the first presentment.”

Question 534: What are the requirements of this section?

Sec. 380. General or Qualified Acceptance.

Case No. 535. Uniform Negotiable Instruments Act, Secs. 140, 141, 142.

“[Sec. 140.] An acceptance to pay at a particular place is a general acceptance unless it expressly states that the bill is to be paid there only, and not elsewhere.

“[Sec. 141.] An acceptance is qualified which is:

“1. Conditional; that is to say, which makes payment by the acceptor dependent on the fulfillment of a condition therein stated.

“2. Partial; that is to say, an acceptance to pay part only of the amount for which the bill is drawn.

“3. Local; that is to say, an acceptance to pay only at a particular place.

“4. Qualified as to time.

“5. The acceptance of some one or more of the drawees but not of all.

“[Sec. 142.] The holder may refuse to take a qualified acceptance, and if he does not obtain an unqualified acceptance, he may treat the bill as dishonored by non-acceptance. Where a qualified acceptance is taken, the drawer and indorsers are discharged from liability on the bill, unless they have expressly or impliedly author-

ized the holder to take a qualified acceptance, or subsequently assent thereto. When the drawer or indorser receives notice of a qualified acceptance, he must within a reasonable time express his dissent to the holder, or he will be deemed to have assented thereto."

Question 535: (1.) A, as drawee, writes across the bill "Accepted, payable at First National Bank" (the bill otherwise naming no place of payment) and returns it to the holder, who refuses to take such acceptance and treats the bill as dishonored. Has it been dishonored?

(2.) In what ways may an acceptance be qualified?

(3.) If the acceptance is qualified, must the holder content himself with such acceptance? What can he do?

(4.) What is the effect of a refusal to dissent upon receiving notice of a qualified acceptance?

CHAPTER SIXTY-EIGHT

PRESENTMENT FOR ACCEPTANCE

§ 381. When required.

§ 382. Presentment for acceptance within what time.

§ 383. Requirements as to presentment for acceptance.

§ 384. Delay in presenting and presentment excused when.

§ 385. Dishonor by non-acceptance and rights accruing thereunder.

Sec. 381. When Presentment for Acceptance Required.

Case No. 536. Uniform Negotiable Instruments Act, Sec. 143.

“Presentment for acceptance must be made:

“1. Where the bill is payable after sight, or any other case where presentment for acceptance is necessary in order to fix the maturity of the instrument; or,

“2. Where the bill is drawn payable elsewhere than at the residence or place of business of the drawee.

“In no other case is presentment for acceptance necessary in order to render any party to the bill liable.”

Question 536: In what cases *must* presentment for acceptance be made?

Sec. 382. Presentment for Acceptance Within What Time.

Case No. 537. Uniform Negotiable Instruments Act, Sec. 144.

“Sec. 144. Except as herein otherwise provided, the holder of a bill which is required by the next preceding

section to be presented for acceptance must either present it for acceptance or negotiate it within a reasonable time. If he fails to do so the drawer and all indorsers are discharged."

Question 537: Within what time must presentment for acceptance be made?

Sec. 383. Requirements as to Presentment for Acceptance.

Case No. 538. Uniform Negotiable Instruments Act, Secs. 145, 146.

"Presentment for acceptance must be made by or on behalf of the holder at a reasonable hour, on a business day, and before the bill is overdue, to the drawee or some person authorized to accept or refuse acceptance on his behalf; and,

"1. Where a bill is addressed to two or more drawees who are not partners, presentment must be made to them all, unless one has authority to accept or refuse acceptance for all, in which case presentment may be made to him only.

"2. Where the drawee is dead, presentment may be made to his personal representatives.

"3. Where the drawee has been adjudged a bankrupt or an insolvent, or has made an assignment for the benefit of creditors, presentment may be made to him or to his trustee or assignee.

"A bill may be presented for acceptance on any day on which negotiable instruments may be presented for payment under the provisions of sections 72 and 85 of this Act. When Saturday is not otherwise a holiday, presentment for acceptance may be made before 12:00 o'clock noon on that day."

Question 538: When must presentment for acceptance be made? To whom, under varying circumstances?

**Sec. 384. Delay in Presenting and Presentment Excused
When.**

Case. No. 539. Uniform Negotiable Instruments Act, Secs. 147, 148.

“[Sec. 147.] Where the holder of a bill drawn payable elsewhere than at the place of business or residence of the drawee has not time, with the exercise of reasonable diligence to present the bill for acceptance before presenting it for payment on the day that it falls due, the delay caused by presenting the bill for acceptance before presenting it for payment is excused and does not discharge the drawers and indorsers.

“[Sec. 148.] Presentment for acceptance is excused and a bill may be treated as dishonored by non-acceptance in either of the following cases:

“1. Where the drawee is dead, or has absconded, or is a fictitious person or a person not having capacity to contract by bill.

“2. Where, after the exercise of reasonable diligence presentment cannot be made.

“3. Where, although presentment has been irregular, acceptance has been refused on some ground.”

Question 539: When is presentment excused? Delay excused?

**Sec. 385. Dishonor by Non-acceptance and Rights
Accruing Thereunder.**

Case No. 540. Uniform Negotiable Instruments Act, Secs. 149, 150, 151.

“[Sec. 149.] A bill is dishonored by non-acceptance:

“1. When it is duly presented for acceptance and such an acceptance as is prescribed by this Act is refused or can not be obtained; or

“2. When a presentment for acceptance is excused and the bill is not accepted.

“[Sec. 150.] Where a bill is duly presented for acceptance and is not accepted within the prescribed time, the person presenting it must treat the bill as dishonored by non-acceptance, or he loses the right of recourse against the drawer and indorser.

“[Sec. 151.] When a bill is dishonored by non-acceptance, an immediate right of recourse against the drawers and indorsers accrues to the holders, and no presentment for payment is necessary.”

Question 540: (1.) When is a bill dishonored by non-acceptance?

(2.) If non-accepted, what right has the holder?

CHAPTER SIXTY-NINE

PROTEST

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| § 386. Protest necessary when. | § 390. Protest for better security. |
| § 387. Requirements as to protest. | § 391. Protest dispensed with when. |
| § 388. By whom protest may be made. | § 392. Protest on lost or destroyed bill. |
| § 389. When and where protest must be made. | |

Sec. 386. Protest Necessary When.

Case No. 541. Uniform Negotiable Instruments Act, Sec. 152.

“Where a foreign bill appearing on its face to be such, is dishonored by non-acceptance, and when such a bill which has not previously been dishonored by non-acceptance is dishonored by non-payment, it must be duly protested for non-payment. If it is not so protested, the drawer and indorsers are discharged. Where a bill does not on its face purport to be a foreign bill, protest thereof, in case of dishonor, is unnecessary.”

Question 541: When is protest necessary? Is it necessary on an inland bill or a promissory note? What is the effect of omitting protest when necessary?

Sec. 387. Requirements as to Protest.

Case No. 542. Uniform Negotiable Instruments Act, Sec. 153.

“The protest must be annexed to the bill or must contain a copy thereof, and must be under the hand and seal of the notary making it and must specify:

“1. The time and place of presentment.

“2. The fact that presentment was made and the manner thereof.

“3. The cause or reason for protesting the bill.

“4. The demand made and the answer given, if any, of the fact, that the drawee or acceptor could not be found.”

Question 542: What are the requirements as to protest?

Sec. 388. By Whom Protest May Be Made.

Case No. 543. Uniform Negotiable Instruments Act, Sec. 154.

“Protest may be made by:

“1. A notary public; or,

“2. By any respectable resident of the place where the bill is dishonored, in the presence of two or more credible witnesses.”

Question 543: By whom may protest be made?

Sec. 389. When and Where Protest Must Be Made.

Case No. 544. Uniform Negotiable Instruments Act, Secs. 155, 156.

“When a bill is protested, such protest must be made on the day of its dishonor, unless delay is excused as herein provided. When a bill has been duly noted, the protest may be subsequently extended as of the date of the noting.

“A bill must be protested at the place where it is dishonored, except that when a bill drawn payable at the place of business or residence of some person, other than the drawee, has been dishonored by non-acceptance, it must be protested for non-payment at the place where it is expressed to be payable; and no other presentment for payment to, or demand on, the drawee is necessary.”

Question 554: When must protest be made? Where?

Sec. 390. Protest for Better Security.

Case No. 545. Uniform Negotiable Instruments Act, Sec. 158.

“When the acceptor has been adjudged a bankrupt or an insolvent or has made an assignment for the benefit of creditors, before the bill matures, the holder may cause the bill to be protested for better security against the drawer and indorsers.”

Question 545: What is protest for better security?

Sec. 391. Protest Dispensed With When.

Case No. 546. Uniform Negotiable Instruments Act, Sec. 159.

“Protest is dispensed with by any circumstances which would dispense with notice of dishonor. Delay in noting or protesting is excused when delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct or negligence. When the cause of delay ceases to operate, the bill must be noted or protested with reasonable diligence.”

Question 546: When will protest be dispensed with?

Sec. 392. Protest on Lost or Destroyed Bill.

Case No. 547. Uniform Negotiable Instruments Act, Sec. 160.

“Where a bill is lost or destroyed, or is wrongly detained from the person entitled to hold it, protest may be made on a copy or written particulars thereof.”

Question 547: How is protest made on lost or destroyed bill?

CHAPTER SEVENTY

ACCEPTANCE AND PAYMENT FOR HONOR

§ 393. Acceptance for honor; requirements and effect thereof.

§ 394. Payment for honor.

Sec. 393. Acceptance for Honor—Requirements and Effect Thereof.

Case No. 548. Uniform Negotiable Instruments Act, Secs. 161-170.

“[Sec. 161.] Where a bill of exchange has been protested for dishonor by non-acceptance, or protested for better security and is not overdue, any person not being a party already liable thereon, may, with the consent of the holder, intervene and accept the bill *supra* protest for the honor of any party liable thereon or for the honor of the person for whose account the bill is drawn. The acceptance for honor may be for part only of the sum for which the bill is drawn, and where there has been an acceptance for honor for one party there may be a further acceptance by a different person for the honor of another party.

“[Sec. 162.] An acceptance for honor *supra* protest must be in writing and indicate that it is an acceptance for honor, and must be signed by the acceptor for honor.

“[Sec. 163.] Where an acceptance for honor does not expressly state for whose honor it was made, it is deemed to be an acceptance for the honor of the drawer.

“[Sec. 164.] The acceptor for honor is liable to the holder and to all parties to the bill subsequent to the party for whose honor he has accepted.

“[Sec. 165.] The acceptor for honor by such acceptance engages that he will, on due presentment, pay the bill according to the terms of his acceptance: Provided, it shall not have been paid by the drawee: And provided, also, that it shall have been duly presented for payment and protested for non-payment and notice of dishonor given to him.

“[Sec. 166.] When a bill payable after sight is accepted for honor, its maturity is calculated from the date of the noting for non-acceptance and not from the date of the acceptance for honor.

[Sec. 167.] Where a dishonored bill has been accepted for honor *supra* protest or contains a reference in case of need, it must be protested for non-payment before it is presented for payment to the acceptor for honor or referee in case of need.

“[Sec. 168.] Presentment for payment to the acceptor for honor must be made as follows:

“1. If it is to be presented in the place where the protest for non-payment was made, it must be presented not later than the day following its maturity.

“2. If it is to be presented in some other place than the place where it was protested, then it must be forwarded within the time specified in section 104.

“[Sec. 169.] The provisions of section 81 apply where there is delay in making presentment to the acceptor for honor or referee in case of need.

“[Sec. 170.] When the bill is dishonored by the acceptor for honor, it must be protested for non-payment by him.”

Question 548: (1.) What is acceptance *supra* protest? How must it be made?

(2.) Where not stated, for whose honor is it presumed made?

(3.) To whom is acceptor for honor liable? Provided what?

Sec. 394. Payment for Honor.

Case No. 549. Uniform Negotiable Instruments Act, Secs. 171-177.

“[Sec. 171.] Where a bill has been protested for non-payment, any person may intervene and pay it *supra* protest for the honor of any person liable thereon or for the honor of the person for whose account it was drawn.

“[Sec. 172.] The payment for honor *supra* protest in order to operate as such, and not as a mere voluntary payment, must be attested by a notarial act of honor, which may be appended to the protest or form an extension to it.

“[Sec. 173.] The notarial act of honor must be founded on a declaration made by the payer for honor or by his agent in that behalf declaring his intention to pay the bill for honor and for whose honor he pays.

“[Sec. 174.] Where two or more persons offer to pay a bill for the honor of different parties, the person whose payment will discharge most parties to the bill is to be given preference.

“[Sec. 175.] Where a bill has been paid for honor, all parties subsequent to the party for whose honor it is paid, are discharged, but the payer for honor is subrogated for, and succeeds to, both the rights and duties of the holder as regards the party for whose honor he pays and all parties liable to the latter.

“[Sec. 176.] Where the holder of a bill refuses to receive payment *supra* protest, he loses his right of recourse against any party who would have been discharged by such payment.

“[Sec. 177.] The payer for honor, on paying to the holder the amount of the bill and the notarial expenses incidental to its dishonor, is entitled to receive both the bill itself and the protest.”

Question 549: What is payment for honor? How is it made? What is its effect on rights and liabilities?

CHAPTER SEVENTY-ONE

BILLS IN A SET

Sec. 395. Bills in a Set Defined.

Case No. 550. Uniform Negotiable Instruments Act, Secs. 178-183.

“[Sec. 178.] Where a bill is drawn in a set, each part of the set being numbered and containing a reference to other parts, the whole of the parts constitute one bill.

“[Sec. 179.] Where two or more parts of a set are negotiated to different holders in due course, the holder whose title first accrues is, as between such holders, the true owner of the bill. But nothing in this section affects the rights of a person who in due course accepts or pays the part first presented to him.

“[Sec. 180.] Where the holder of a set indorses two or more parts to different persons he is liable on every such part and every indorser subsequent to him is liable on the part he has himself indorsed, as if such parts were separate bills.

“[Sec. 181.] The acceptance may be written on any part and it must be written on one part only. If the drawee accepts more than one part, and such accepted parts are negotiated to different holders in due course, he is liable on every such part as if it were a separate bill.

“[Sec. 182.] When the acceptor of a bill drawn in a set pays it without requiring the part bearing his acceptance to be delivered up to him, and that part at maturity is outstanding in the hands of a holder in due course, he is liable to the holder thereon.

“[Sec. 183.] Except as herein otherwise provided, where any one part of a bill drawn in a set is discharged by payment or otherwise, the whole bill is discharged.”

Question 550: (1.) Where a bill is drawn in a set what is the relation of each part to the set?

(2.) If different parts are indorsed to different holders, what is the effect?

(3.) Should the drawee accept more than one part?

Case No. 551. *Hazzard v. Shelton*, 15 Ala. 62.

COLLIER, C. J.: “It is common, and the practice is of long standing, for the drawer to make and deliver to the payee several parts, usually designated a set of the same bills of exchange, each one of which states upon its face, that either part of the set being paid, the bill is to be considered discharged. A bill is thus drawn to avoid delays and inconveniences, which might otherwise arise from its loss or miscarriage, and also to enable the holder to transmit the same by different conveyances to the drawee, so as to insure the most prompt and speedy presentment for acceptance and payment. *Chitty on Bills*, 9 Am. ed. 175-6; *Story on Bills*, Secs. 66, 67. The *bona fide* holder of any one of the set, if accepted, it is said, may recover the amount from the acceptor, who would not be bound to accept any other of the set, which was held by another person, although he might be the first holder. So payment to the holder of one part will be a complete discharge of the acceptor as to all the other parts. *Id.* 176; *Id.* Sec. 226. If one of the parts has been accepted, the payment of another unaccepted part will not liberate the acceptor from liability to pay the holder of the accepted part, and such acceptor may therefore refuse to pay the bearer of the unaccepted part, and may compel him, if he suggests that he has lost the accepted part, to find sureties against his liability to pay the accepted part. See *Wells v. Whitehead*, 15 Wend. Rep. 527; *Chit. on Bills*, *supra*. And it would seem to have been held, that a person to whom any part of the

set is first transferred, acquires a property in all the other parts and may maintain trover even against a *bona fide* holder, who subsequently, by transfer or otherwise, gets possession of another part of the set. *Holds-worth v. Hunter*, 10 Barnw. & C. Rep. 449; *Perriera v. Jopp*, Id. 450, note, a.

“In the case at bar, it is inferable from the number declared on that the bill was drawn in a set of two parts, and that each was a counterpart of the other, save that one was called the ‘first,’ and the other the ‘second of exchange.’ Each part requests the drawee to pay it, if the other is ‘unpaid,’ and is equivalent to a direction to pay it only in that event. The payment of one part then, according to the literal import of the paper, is a complete compliance with the request of the drawer, and if the drawee has not accepted the other part, he is under no obligation either to accept or pay it. If he is in any manner chargeable upon it, or to some other person than the plaintiff, it devolves upon him to prove it, as a ground of defence, and the holder need not negative by proof the existence of such a state of facts.

“This argument is not inappropriate to the case of a drawer when sued for the default of the drawee. If he pays the accepted part without notice of the adverse claim of some third person, under another of the set, he cannot be charged a second time upon the latter. Here the holder of the accepted number is asking a judgment upon it. The payment of it, we have seen, would be proper, and operate a discharge of the liability indicated by the entire set; and the authorities cited are direct to establish, that if a demand of payment is properly shown or excused, then he is entitled to recover.”

Question 551: What is the purpose of drawing a bill in a set?

PART XXIII

PROMISSORY NOTES AND CHECKS PARTICULARLY CONSIDERED

CHAPTER SEVENTY-TWO

IN PARTICULAR OF PROMISSORY NOTES AND CHECKS

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| § 396. Negotiable promissory notes defined. | § 399. Certification of check equivalent of acceptance. |
| § 397. Checks defined. | § 400. Effect of certification on liability of drawer. |
| § 398. When check must be presented for payment. | § 401. Check as an assignment. |

Sec. 396. Negotiable Promissory Notes Defined.

Case No. 552. Uniform Negotiable Instruments Act, Sec. 184.

“A negotiable promissory note within the meaning of this Act is an unconditional promise in writing made by one person to another, signed by the maker, engaging to pay on demand or at a fixed or determinable future time, a sum certain in money to order or to bearer. Where a note is drawn to the maker’s own order, it is not complete until indorsed by him.”

Question 552: Define a negotiable promissory note.

Sec. 397. Checks Defined.

Case No. 553. *Columbian Bank Co. v. Bowen*, 134 Wis. 218.

(Set out as Case No. 498, *supra*.)

Question 553: Define a check.

Sec. 398. When Check Must Be Presented for Payment.

Case No. 554. Gordon v. Levine, 194 Mass. 418.

Facts: The facts are given in the opinion.

Point Involved: Within what time a check must be presented to the bank for payment to have recourse against the drawer in case of loss caused by delay.

MORTON, J.: "This is an action upon a check by the plaintiff as payee against the defendant as drawer. The check was dated December 30, 1905, which was Saturday, though there was some question whether it was actually drawn and delivered on that day or the 31st. The plaintiff is described in the writ as of Chelsea and the defendant as of Boston. The bank on which the check was drawn was in Boston and the check was drawn and delivered there. The plaintiff testified that the defendant asked him not to present the check for a couple of days as he did not have sufficient funds to meet it, but that he presented it Monday morning, January 1, and was told there was no funds, and that he went to see the defendant at his place of business but did not see him. The plaintiff also testified that in the afternoon of the same day he passed the check to one Saievitz in payment of a bill which he owed him, receiving the balance in cash. And there was testimony tending to show that on the next day Saievitz indorsed it to one Rootstein, who deposited it on January 4 in the Faneuil Hall National Bank in Boston for collection, and that the bank's messenger went with it on the afternoon of the following day, Friday, January 5, to the bank on which it was drawn, the Provident Securities and Banking Company, and found its doors closed. The plaintiff also testified that he told the defendant that the bank had failed, and that the defendant promised to make the check good. The defendant denied this, and also the plaintiff's statement that he had

asked the plaintiff not to present the check for a couple of days, and introduced testimony tending to show that at the time when the check was drawn he had sufficient funds on deposit at the bank to meet it, and continued to have down to the failure of the bank. It was admitted that the bank failed on Friday, January 5, and the defendant introduced evidence tending to show that he had received no payment or dividend on account of his deposit. There was a verdict for the plaintiff, and the case is here on exceptions by the defendant to the refusal of the judge to give certain instructions that were requested, and to the admission of certain testimony. * * *

“The general rule is as was stated by the judge and as is provided in the Negotiable Instruments Act (R. L. c. 73, Sec. 203) that a check must be presented for payment within a reasonable time after it is issued. If it is not so presented, and the drawer sustains a loss by reason of the failure of the drawee, he will be discharged from liability to the extent of such loss, continuing liable otherwise. This results from the nature of the instrument which though defined in the Negotiable Instruments Act (R. L. c. 73, Sec. 202) as a bill of exchange drawn on a bank payable on demand is intended for immediate use (*Mussey v. Eagle Bank*, 9 Met. 306, 314), and not to circulate as a promissory note, and it consequently would be unjust to subject the drawer to the loss if any resulting from failure to present it for payment within a reasonable time. What is a reasonable time, however, still remains for consideration. The Negotiable Instruments Act provides generally (R. L. c. 73, Sec. 209), as the judge said, that ‘In determining what is a “reasonable time” or an “unreasonable time” regard is to be had to the nature of the instrument, the usage of trade or business, if any, with respect to such instruments, and the facts of the particular case.’ This, however, would not seem to lay down or to establish any new rule. The nature of the instrument and the facts of the particular case have always been considered in passing upon the question of reasonable or unreasonable time. In deciding,

therefore, whether this check was presented within a reasonable time, if presented on Friday, resort must be had to the rules which have been hitherto established in similar cases. And one of the rules which has been established is, that where the drawer and drawee and the payee are all in the same city or town, a check, to be presented within a reasonable time, should be presented at some time before the close of banking hours on the day after it is issued, and that its circulation from hand to hand will not extend the time of presentment to the detriment of the drawer. If it is presented and paid afterwards the drawer suffers no harm. But if not presented within the time thus fixed, and there is a loss, it falls not on him but on the holder."

Question 554: (1.) Within what time must a check be presented for payment?

(2.) What were the facts in this case?

Sec. 399. Certification of Check Equivalent to Acceptance.

Case No. 555. Uniform Negotiable Instruments Act, Sec. 187.

"Where a check is certified by the bank on which it is drawn, it is equivalent to an acceptance."

Question 555: State the provisions of this section.

Case No. 556. Wisner v. First National Bank.
(Set out as Case No. 583, *supra*.)

Question 556: See the questions set out after the case.

Case No. 557. Poess v. Twelfth Ward Bank, 86 N. Y. Suppl. 857.

Facts: Poess drew a check on the Twelfth Ward Bank, payable to his own order, for \$500, and had it certified by the bank. Not using it, he indorsed it in blank, made out

a deposit slip and went to the bank to re-deposit it. On reaching the bank, the check was missing. He ordered payment stopped. The check turned up in a few days from Zuccaro, a banker, who had acquired it in due course from a man who could not be found. Plaintiff told Zuccaro that he would have to pay the check and Zuccaro thereupon paid plaintiff \$500, who deposited it with the Twelfth Ward Bank. The bank then refused to pay plaintiff this \$500 unless protected by a bond on the ground that Zuccaro might sue it. Poess sues to recover the money.

Point Involved: Whether Poess could hold the bank for the money thus deposited; whether Poess could have stopped payment as against a holder in due course of the lost check; whether Zuccaro, who paid the maker the money which he was entitled to keep, could recover it from the bank.

GILDERSLEEVE, J.: “* * *

“The relation between the bank and the plaintiff was that of debtor and creditor. The effect of the certification of the check by the defendant was to charge plaintiff with \$500, pass that amount to the credit of the check, and make the defendant, as acceptor, primarily liable for its payment to any *bona fide* holder thereof. *Jersey City First National Bank v. Leach*, 52 N. Y. 350, 11 Am. Rep. 708; *Daniel on Negotiable Instruments*, Sec. 1603; *People v. St. Nicholas Bank*, 77 Hun, 160, 28 N. Y. Supp. 407.

“The check in question had been duly indorsed, and was negotiable. Its possession by Zuccaro, before he passed it forward for collection was *prima facie* evidence of title. His good faith is not assailed, and his title to the check was not affected by the fact that it had been stolen and never had a valid delivery. Zuccaro received the check in the usual course of business, and without notice of any infirmity. ‘Where the instrument is no longer in the possession of a party whose signature appears thereon, a valid and intentional delivery is presumed until the contrary is proved.’ *Negotiable Instru-*

ment Law (Laws 1897, P. 719, c. 612); Am. & Eng. Ency. of Law (2d Ed.) p. 320; Shipley v. Carroll, 45 Ill. 285; Case v. Mechanics' Banking Ass'n, 4 N. Y. 166.

“For the reasons above stated, as between Zuccaro and the defendant he was entitled to have the check honored and paid, and it must be presumed that the payment of the check by the defendant was made to the lawful holder in good faith. Notice to the defendant that the check had been lost, and the direction by the plaintiff not to pay the check if presented, could not operate, under the circumstances, to the prejudice of Zuccaro and affect his rights. Nassau Bank v. Broadway Bank, 54 Barb. 236; Am. & Eng. Ency. of L. (2d Ed.), vol. 19, p. 553. The authorities above cited also support this latter proposition.

“We therefore see that, if Zuccaro had not repaid the check in due course, the parties to this action would have been powerless to compel him to refund. But Zuccaro having, on their demand, voluntarily repaid the amount he had thus received, the question presented is whether he can maintain any further claim against the defendant. We think this question demands an answer favorable to the plaintiff. The defendant lost nothing by certifying and paying the check in due course, because it had appropriated sufficient funds of the plaintiff for that purpose at the time of the certification, and upon its payment in due course the check became discharged, under the express provision of Sec. 90 of the Negotiable Instruments Law (Laws 1897, p. 731, c. 612). That being so, Zuccaro can no longer maintain an action against the defendant upon its acceptance or certification. The check was simply surrendered to him after its payment in due course to enable him to pursue his remedy against the party from whom he had taken it. Much less can an action be maintained by any one claiming through him. The check is not in the record, but, since it was paid by the defendant, we must infer that it bears upon its face unmistakable evidence of payment. There never hereafter can be a *bona fide* holder thereof. The defendant's situation is to all intents and purposes the same as if an honest

finder of the check had returned it to the bank, making no claim upon it.

“The rule on this subject is that, if the holder expressly renounces a claim against the acceptor, ‘his hands are united, and he is left free to account to the drawer for the funds in his hands, or is no longer bound to apply them to the payment of the bill. To permit the holder, after thus exonerating the acceptor, to recur to him for payment would work in many cases the harshest injustice, and he is estopped from doing so.’ Daniel on Negotiable Instruments, Secs. 542, 544. Here the discharge of the defendant was complete when the check was paid in due course. The defendant’s messenger, for plaintiff’s benefit, demanded the repayment of the money the defendant had paid Zuccaro, and threatened to hold him responsible for it. He yielded to that demand, and refunded the money, and the check was surrendered to him. Under the authorities, Zuccaro is estopped to recover the same money from the defendant. * * *”

Question 557: (1.) Could the bank in this case have been held by Zuccaro notwithstanding the maker’s attempt to stop payment?

(2.) Was Zuccaro discharging a legal liability when he paid the \$500 to Poess?

Sec. 400. Effect of Certification on Liability of the Drawer.

Case No. 558. First National Bank v. Leach, 52 N. Y. 350.

Facts: The facts are given in the opinion.

Point Involved: Whether the drawer remains secondarily liable on a check certified by the bank: (a) Where certification is procured by drawer; (b) Where certification is procured by holder.

PECKHAM, J.: “The defendant drew the check in controversy, it was discounted by the plaintiff, and on the day it was due it was presented by plaintiff to the drawee,

the Ocean Bank, for certification, was certified as good, and in the afternoon of the same day was presented for payment, which was refused, because between the time of its certificate and its second presentment the drawee, the Ocean Bank, had failed and gone into the hands of a receiver. Did this certification operate as a payment of the check as between these parties?

“The theory of the law is, that where a check is certified to be good by a bank, the amount thereof is then charged to the account of the drawer in the bank certificate account. Every well regulated bank adopts this practice to protect itself.

“The reason thereof is so strong that the law presumes it is adopted by the banks. (Smith v. Miller, 43 N. Y. 171; Meads v. the Merchants’ Bank of Albany, 25 id. 148; The Farmers’ & Mechanics’ Bank v. Butchers’ & Drovers’ Bank, 16 id. 125; Merchants’ Bank v. State Bank, 10 Wall. 647.) It is found to have been done in this case.

“If a bank failed to keep such account and to make such entries, it would necessarily incur the peril of the failure of its customers whose checks it certified, without any account of their number or amount, although it would be liable to pay its certified checks to *bona fide* holders, whether it had funds or not. (Farmers’ & Mechanics’ Bank v. Butchers’ & Drovers’ Bank, *supra*.)

“It follows that, after a check is certified, the drawer of the check cannot draw out the funds then in the bank necessary to meet the certified check. That money is no longer his.

“If he apprehended danger from the suspected failure of the bank, he could not draw out that money, because it had already been appropriated by means of the check thus certified; as to him, it was precisely as if the bank had paid the money upon that check instead of making a certificate of its being good.

“For that reason, the drawer could have no remedy against the bank, by any legal proceeding, to secure himself for the amount of that check. Hence, if the drawer

should get the check back, he would strictly be entitled to get that money, not by virtue of its original deposit, but solely by surrender of the certified check, like any other holder.

“But all that has been yet stated applies with equal force to the acceptance of a time bill of exchange before due. Then, when the drawee accepts, it is an appropriation of the funds, *pro tanto*, for the service and use of the payee or other person holding the bill, so that the amount ceases henceforth to be the money of the drawer, and becomes that of the payee or other holder in the hands of the acceptor. (Story on Bills of Ex., § 14; 1 Pars. on Notes and Bills, 323.)

“It is entirely clear that the acceptance of a time draft, before due, does not operate as a payment as respects the drawer. Its only effect is to make the acceptor the primary party to pay the draft.

“But the parties to a certified check, due when certified, occupy a different position. There the money is due and payable when the check is certified. The bank virtually says that check is good; we have the money of the drawer here ready to pay it. We will pay it now if you will receive it. The holder says no. I will not take the money; you may certify the check and retain the money for me until this check is presented.

“The law will not permit a check, when due, to be thus presented and the money to be left with the bank for the accommodation of the holder, without discharging the drawer.

“The money being due and the check presented, it is his own fault if the holder declines to receive the pay, and for his own convenience has the money appropriated to that check, subject to its future presentment at any time within the statute of limitations.

“The acceptance of a time draft before due is entirely different; there the holder has then no right to the money, and the acceptor no authority to pay until the maturity of the bill. There is no necessity for presenting a check for acceptance, like a time bill, no authority for such pre-

sentment, although the holder has the right to do it. The authority and the duty are to present for payment.

“If, however, the holder choose to have it certified instead of paid, he will do so at the peril of discharging the drawer.

“He cannot change the position and increase the risk of the drawer without discharging him. (Smith v. Miller, *supra*.)

“This would not discharge the drawer of a check, who himself procured it to be certified and then put it in circulation. The reason of the rule fails to apply to him in such case.

“I am not aware of any direct authority upon this question; but upon principle it must be held that the bank holds the money, after certification to the holder, not at the risk of the drawer, but of the holder of the check.

“The judgment must be affirmed.

“All concur.—*Judgment affirmed.*”

Question 558: If a holder of a check has it certified, is the drawer thereby discharged even of secondary liability? What if the drawer procures its certification?

Sec. 401. Check as an Assignment.

Case No. 559. Uniform Negotiable Instruments Act, Sec. 125.

“A check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder, unless and until it accepts or certifies the checks.”

Question 559: A draws a check on M bank to B's order. B presents it to the bank for payment. The bank refuses payment although A has on deposit sufficient funds. B sues the bank. What result?

DIVISION E
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PARTNERSHIPS

DIVISION E

PARTNERSHIPS

- Part XX. General Nature and Formation of Partnerships.
- Part XXI. Firm Name and Property.
- Part XXII. Mutual Rights and Obligations of Partners.
- Part XXIII. Rights of Third Persons against the Partners.
- Part XXIV. Dissolution of the Partnership.

PART XX

GENERAL NATURE AND FORMATION OF PARTNERSHIPS

- Chapter Seventy-three. Partnerships Defined.
- Chapter Seventy-four. The Formation of the Partnership.

CHAPTER SEVENTY-THREE

PARTNERSHIPS DEFINED

- § 402. A partnership an association, not an entity. on, as co-owners, a business with a view to profit.
- § 403. Of parties on a personal basis. § 405. Partnership by estoppel.
- § 404. For the purpose of carrying § 406. Kinds of partnerships.

Sec. 402. A Partnership an Association, Not an Entity.

Case No. 560. E. J. Dupont Demours Powder Co. v. Jones Bros. et al., 200 Fed. 638.

Facts: A partnership was composed of two partners, and had its place of business in the county where one of the partners resided, but the other partner resided in another county. The Ohio law provided that a conditional sale contract to be valid against *bona fide* purchasers and mortgagors shall be filed with the county recorder of the county where the party signing the instrument resides. The conditional sale in question was signed in the partnership name by one of the partners, and recorded in the county where the partnership business was carried on, but not in the other county. It is contended that under this statute and a statute permitting a partnership to sue and be sued in the firm name—a partnership is made an entity, and that filing the contract in the place of business of the partnership is filing it in accordance with the law.

Point Involved: The nature of a partnership as an entity or a relationship between parties.

SATER, D. J.: “* * * As regards the doctrine of partnership entity, it may be observed that one conception of a partnership, arising out of the agreement on which it is founded, is that it is an aggregation of persons associated together to share its profits and losses, owning its property and liable for its debts. Another conception is that it is an artificial being, a distinct entity, separate in estate, in rights, and in obligations, from the partners who compose it. *Re Bertenshaw*, 157 ed. 363, 365, 85 C. C. A. 61, 17 L. R. A. (N. S.) 886, 13 Ann. Cas. 986. The intervener adopts the latter conception, and relies on *Curtis v. Hollingshead*, 14 N. J. Law, 402, 409, 410, *Pooley v. Driver*, L. R. 5 Ch. D. 458, and *Parsons on Partnership* (4th Ed.) § 184, to which may be added the discussion in *Bates on Partnership*, c. 8, § 170 et seq., and authorities cited in *Re Telfer*, 184 Fed. 224, 106 C. C. A. 366 (C. C. A. 6). In *West v. Valley Bank*, 6 Ohio St. 168, 173, a firm is characterized as an ideal mercantile person. This is the mercantile conception of a partnership. *Gilmore*, Part. 114 et seq. The legal conception, however, is quite different. *Gilmore*, Part. 117; *Bates*, Part. § 170. In *Byers v. Schlup*, 51 Ohio St. 314, 38 N. E. page 121, 25 L. R. A. 649, the attitude of a partnership in the eye of the law, as viewed by the Ohio Court, is stated thus:

“ ‘The members of a partnership do not form a collective whole, distinct from the individuals composing it; nor are they collectively endowed with any capacity of acquiring rights or incurring obligations. The rights and liabilities of a partnership are the rights and liabilities of the partners. 1 *Lind*. Part. 5. It is not a creation in which the identity of the individual members is merged and lost, in seeking to enforce against them the obligations of the firm.’

“The doctrine of partnership entity, in the sense that a partnership is an ideal artificial person or being distinct from the individuals composing it, and in which the identity of the individual members is merged and lost, does not obtain in Ohio. Nor does the judicial recogni-

tion of the doctrine of partnership entity change the established rule fixing the substantive rights either of the creditors of the partnership or of its individual members. *Re Telfer*, 184 Fed. 230, 106 C. C. A. 366. The partnership entity, after the enactment of the remedial statute permitting it to sue or be sued in the firm name, remained precisely the same as that prior to its passage, plus the remedial right thereby conferred. Such enactment does not affect the application of the statutory requirement that a chattel mortgage shall be filed with the recorder of the county where the mortgagor resides at the time of its execution. The same rule consequently applies as to the filing of such an instrument in Ohio as in those states in which the common-law rule is in force—the rule that actions affecting partnerships must be brought in the name of or against the individuals composing the same.”

Question 560: Is the partnership an entity? How did the question come to be raised in this case and how did the Court decide?

(Note: How partnership differs from corporation: In the fact that a partnership is not a legal entity, but a relationship, that the liability of the partners is not limited, that the shares of the partnership are not transferrable, that each partner is an agent of the firm, while stockholders are not the agents of the corporation, that a partnership must be for profit, a partnership differs essentially from a corporation.)

Sec. 403. Partnership an Association on a Personal Basis.

(Note: All through the law of partnership we find it emphasized with many results, that a partnership is an agreement of a strictly personal nature. This thought is expressed in the Latin phrase “*delectus personae*.” As a consequence, no member can without permission sell his share to either an outside person or to one of the other partners. A may be willing to be a partner with B and C, but not with B and D, or with B alone. So, death of a partner, dissolves the firm. So, the partner may demand the

highest good faith on the part of his co-partner. These matters are exemplified in the following pages, throughout this subject.)

Sec. 404. A Partnership Is a Relationship Formed for the Purpose of Carrying on a Business in Co-ownership with a View to Profit.

Case No. 561. Meehan v. Valentine, 145 U. S. 611.

Facts: Suit by Thomas J. Meehan, against Valentine as executor of Perry, alleging Perry to have been a partner with Counselman and Scott, under the firm name of L. W. Counselman & Co., and seeking to charge Perry's estate on promissory notes signed by the firm.

The plaintiff put in evidence the following agreement:

"L. W. Counselman, Albert L. Scott, Office of L. W. Counselman & Co., Oyster and Fruit Packers, corner Philpot and Will streets, Baltimore, Md., March 15, 1880. For and in consideration of loans made and to be made to us by Wm. G. Perry, of Philadelphia, amounting in all to the sum of \$10,000, for the term of one year from the date of said loans, we agree to pay to said Wm. G. Perry in addition to the interest thereon, one-tenth of the net profits over and above the sum of \$10,000 on our business for the year commencing May 1, 1880, and ending May 1, 1881—*i. e.*, if our net profits for said year's business exceeds the sum of ten thousand dollars, then we are to pay to said W. G. Perry one-tenth of said excess of profits over and above the said sum of ten thousand dollars; and it is further agreed that if our net profits do not exceed the sum of ten thousand dollars, then he is not to be paid more than the interest on said loan, the same being added to notes at the time they are given, which are to date from the time of said loans, and payable one year from date. L. W. Counselman & Co." This agreement was continued for future years.

"The plaintiff also offered in evidence six promissory notes, amounting to \$10,600, given by the firm to Perry in the months of March, May, and June, 1884.

“The plaintiff also called Scott as a witness, who testified that the firm was composed of L. W. Counselman and himself; who carried on a fruit, vegetable packing and oyster business in Baltimore; that Perry was in the stationery business in Philadelphia; that the \$10,000 mentioned in the agreement was paid by him to the firm, receiving their notes for it, and remained in the business throughout, no part of it having been repaid; that from time to time he lent other sums to the firm, which were repaid; that he was an intimate friend of the witness, and visited him every few weeks, such visits not being specially connected with the business, but business was always talked on such occasions and the place of business visited; that Perry annually received accounts of profits and loss. After a showing that the firm had made an assignment for benefit of creditors, these questions and answers were made:

“Question: Mr. Counselman and yourself did owe this \$10,000 to the estate of Mr. Perry, did you? Answer: They had my notes for it.

“Q. Did you or did you not owe it? A. It was capital he had in the business the same as ours. We owed it to him, of course we owed it to him, if we did not lose it.”

The Court below held that there was no evidence to show that Perry was liable on such notes as a partner and ordered a non-suit. Plaintiff brings the case to this Court.

MR. JUSTICE GRAY: “* * *

“The requisites of a partnership are that the parties must have joined together to carry on a trade or adventure for their common benefit, each contributing property or services, and having a community of interest in the profits. *Ward v. Thompson*, 22 How. 330, 334.

“Some of the principles applicable to the question of the liability of a partner to third persons were stated by Chief Justice Marshall in a general way, as follows: ‘The power of an agent is limited by the authority given him; and, if he transcends that authority, the act cannot

affect his principal; he acts no longer as an agent. The same principle applies to partners. One binds the others so far only as he is the agent of the others.' 'A man who shares in the profit, although his name may not be in the firm, is responsible for all its debts.' 'Stipulations [restricting the powers of partners] may bind the partners, but ought not to affect those to whom they are unknown, and who trust to the general and well-established commercial law.' *Winship v. Bank*, 5 Pet. 529, 561, 562. And the chief justice referred to *Waugh v. Carver*, 2 H. Bl. 235, *ante*; *Ex parte Hamper*, 17 Ves. 403, 412; and *Gow. Partn.* 17.

"How far sharing in the profits of a partnership shall make one liable as a partner has been a subject of much judicial discussion, and the various definitions have been approximate rather than exhaustive.

"The rule formerly laid down and long acted on as established, was that a man who received a certain share of the profits as profits, with a lien on the whole profits as security for his share, was liable as a partner for the debts of the partnership, even if it had been stipulated between him and his co-partners that he should not be so liable; but that merely receiving compensation for labor or services, estimated by a certain proportion of the profits, did not render one liable as a partner. * * *

"Accordingly, this Court, at December term, 1860, decided that a person employed to sell goods under an agreement that he should receive half the profits, and that they should not be less than a certain sum, was not a partner with his employer. 'Actual participation in the profits as principal,' said Mr. Justice Clifford in delivering judgment, 'creates a partnership as between the parties and third persons, whatever may be their intentions in that behalf, and notwithstanding the dormant partner was not expected to participate in the loss beyond the amount of the profits,' or 'may have expressly stipulated with his associates against all the usual incidents to that relation. That rule, however, has no application whatever to a case of service or special agency,

where the employe has no power as a partner in the firm and no interest in the profits, as property, but is simply employed as a servant or special agent, and is to receive a given sum out of the profits, or a proportion of the same, as a compensation for his services.' *Berthold v. Goldsmith*, 24 How. 536, 542, 543. See, also, *Seymour v. Freer*, 8 Wall. 202, 215, 222, 226; *Beckwith v. Talbot*, 95 U. S. 289, 293; *Edwards v. Tracy*, 62 Pa. St. 374; *Burnett v. Snyder*, 81 N. Y. 550, 555.

"Mr. Justice Story, at the beginning of his *Commentaries on Partnership*, first published in 1841, said: 'Every partner is an agent of the partnership; and his rights, powers, duties, and obligations are in many respects governed by the same rules and principles as those of an agent. A partner, indeed, virtually embraces the character both of a principal and of an agent. So far as he acts for himself and his own interest in the common concerns of the partnership, he may properly be deemed a principal; and so far as he acts for his partners, he may as properly be deemed an agent. The principal distinction between him and a mere agent is that he has a community of interest with the other partners in the whole property and business and responsibilities of the partnership; whereas an agent, as such, has no interest in either. Pothier considers partnership as but a species of mandate, saying *contractus societatis, non secus ac contractus mandati*.' Afterwards, in discussing the reasons and limits of the rule by which one may be charged as a partner by reason of having received part of the profits of the partnership, Mr. Justice Story observed that the rule was justified and the cases in which it had been applied reconciled, by considering that 'a participation in the profits will ordinarily establish the existence of a partnership between the parties in favor of third persons, in the absence of all other opposing circumstances;' but that it is not 'to be regarded as anything more than mere presumptive proof thereof, and therefore liable to be repelled and overcome by other circumstances, and not as of itself overcoming or controlling

them;’ and therefore that, ‘if the participation in the profits can be clearly shown to be in the character of agent, then the presumption of partnership is repelled.’ And again: ‘The true rule, *ex æquo et bono*, would seem to be that the agreement and intention of the parties themselves should govern all the cases. If they intended a partnership in the capital stock, or in the profits, or in both, then that the same rule should apply in favor of third persons, even if the agreement were unknown to them. And on the other hand, if no such partnership were intended between the parties, then that there should be none as to third persons, unless where the parties had held themselves out as partners to the public, or their conduct operated as a fraud or deceit upon third persons.’ Story, Partn. §§ 1, 38, 49.

“Baron Parke (afterwards Lord Wensleydale) appears to have taken much the same view of the subject as Mr. Justice Story. Both in the Court of Exchequer and in the House of Lords he was wont to treat the liability of one sought to be charged as a dormant partner for the acts of the active partners as depending on the law of principal and agent. *Beckham v. Drake* (1841), 9 Mees. & W. 79, 98; *Wilson v. Whitehead* (1842), 10 Mees. & W. 503, 504; *Ernest v. Nicholls* (1857), 6 H. L. Cas. 401, 417; *Cox v. Hickman* (1860), 8 H. L. Cas. 268, 312, *ante*. And in *Cox v. Hickman* he quoted the statements of Story and Pothier from Story, Partn. § 1, above cited.

“In that case, two merchants and co-partners, becoming embarrassed in their circumstances, assigned all their property to trustees, empowering them to carry on the business, and to divide the net income ratably among their creditors (all of whom became parties to the deed), and to pay any residue to the debtors, the majority of the creditors being authorized to make rules for conducting the business or to put an end to it altogether. The house of lords, differing from the majority of the judges who delivered opinions at various stages of the case, held that the creditors were not liable as partners for debts incurred by the trustees in carrying on the

business under the assignment. The decision was put upon the ground that the liability of one partner for the acts of his co-partner is in truth the liability of a principal for the acts of his agent; that a right to participate in the profits, though cogent, is not conclusive, evidence that the business is carried on in part for the person receiving them; and that the test of his liability as a partner is whether he has authorized the managers of the business to carry it on in his behalf. *Cox v. Hickman*, 8 H. L. Cas. 268, 304, 306, 312, 313, nom. *Wheatcroft v. Hickman*, 9 C. B. (N. S.) 47, 90, 92, 98, 99.

“This new form of stating the general rule did not at first prove easier of application than the old one; for in the first case which arose afterwards one judge of three dissented (*Kilshaw v. Jukes*, 3 Best & S. 847), and in the next case the unanimous judgment of four judges in the common bench was reversed by four judges against two in the exchequer chamber (*Bullen v. Sharp*, 18 C. B. [N. S.] 614, and L. R. 1 C. P. 86). And, as has been pointed out in later English cases, the reference to agency as a test of partnership was unfortunate and inconclusive, inasmuch as agency results from partnership rather than partnership from agency. *Kelly, C. B.*, and *Cleasby, B.*, in *Holme v. Hammond*, L. R. 7 Exch. 218, 227, 233; *Jessel, M. R.*, in *Pooley v. Driver*, 5 Ch. Div. 458, 476. Such a test seems to give a synonym, rather than a definition; another name for the conclusion, rather than a statement of the premises from which the conclusion is to be drawn. To say that a person is liable as a partner, who stands in the relation of principal to those by whom the business is actually carried on, adds nothing by way of precision, for the very idea of partnership includes the relation of principal and agent. * * *

“In other respects, however, the rule laid down in *Cox v. Hickman* has been unhesitatingly accepted in England, as explaining and modifying the earlier rule. In *re English & Irish Society*, 1 Hem. & M. 85, 106, 107; *Mollwo v. Court of Wards*, L. R. 4 P. C. 419, 435; *Ross v. Parkyns*, L. R. 20 Eq. 331, 335; *Ex parte Tennant*, 6 Ch. Div. 303;

Ex parte Delhasse, 7 Ch. Div. 511; Badeley v. Bank, 38 Ch. Div. 238. See, also, Davis v. Patrick, 122 U. S. 138, 151, 7 Sup. Ct. Rep. 1102; Eastman v. Clark, 53 N. H. 276, 16 Am. Rep. 192; Wild v. Davenport, 48 N. J. Law, 129, 7 Atl. Rep. 295, 57 Am. Rep. 552; Seabury v. Bolles, 51 N. J. Law, 103, 16 Atl. Rep. 54, and 52 N. J. Law, 413, 21 Atl. Rep. 952; Morgan v. Farrell, 58 Conn. 413, 20 Atl. Rep. 614.

“In the present state of the law upon this subject, it may, perhaps, be doubted whether any more precise general rule can be laid down than, as indicated at the beginning of this opinion, that those persons are partners who contribute either property or money to carry on a joint business for their common benefit, and who own and share the profits thereof in certain proportions. If they do this, the incidents or consequences follow that the acts of one in conducting the partnership business are the acts of all; that each is agent for the firm and for the other partners; that each receives part of the profits as profits, and takes part of the fund to which the creditors of the partnership have a right to look for the payment of their debts; that all are liable as partners upon contracts made by any of them with third persons within the scope of the partnership business; and that even an express stipulation between them that one shall not be so liable, though good between themselves, is ineffectual as against third persons. And participating in profits is presumptive, but not conclusive, evidence of partnership.

“In whatever form the rule is expressed, it is universally held that an agent or servant, whose compensation is measured by a certain proportion of the profits of the partnership business, is not thereby made a partner, in any sense. So an agreement that the lessor of a hotel shall receive a certain portion of the profits thereof by way of rent does not make him a partner with the lessee. Perrine v. Hankinson, 11 N. J. Law, 215; Holmes v. Railroad Co., 5 Gray, 58; Beecher v. Bush, 45 Mich. 188, 7 N. W. Rep. 785, *ante*. And it is now equally well settled

that the receiving of part of the profits of a commercial partnership, in lieu of or in addition to interest by way of compensation for a loan of money, has of itself no greater effect. *Wilson v. Edmonds*, 130 U. S. 472, 482, 9 Sup. Ct. Rep. 563; *Richardson v. Hughitt*, 76 N. Y. 55, 32 Am. Rep. 267; *Curry v. Fowler*, 87 N. Y. 33, 41 Am. Rep. 343; *Cassidy v. Hall*, 97 N. Y. 159; *Smith v. Knight*, 71 Ill. 148, 22 Am. Rep. 94; *Williams v. Soutter*, 7 Iowa 435, 446; *Smelting Co. v. Smith*, 13 R. I. 27, 43 Am. Rep. 3; *Mollwo v. Court of Wards*, and *Badeley v. Bank*, above cited.

“In some of the cases most relied on by the plaintiff, the person held liable as a partner furnished the whole capital on which the business was carried on by another, or else contributed part of the capital and took an active part in the management of the business. *Beauregard v. Case*, 91 U. S. 134; *Hackett v. Stanley*, 115 N. Y. 625, 627, 628, 633, 22 N. E. Rep. 745; *Pratt v. Langdon*, 12 Allen, 544, and 97 Mass. 97, 93 Am. Dec. 61; *Rowland v. Long*, 45 Md. 439. And in *Mollwo v. Court of Wards*, above cited, after speaking of a contract of loan and security, in which no partnership was intended, it was justly observed: ‘If cases should occur where any persons, under the guise of such an arrangement, are really trading as principals, and putting forward, as ostensible traders, others who are really their agents, they must not hope by such devices to escape liability; for the law, in cases of this kind, will look at the body and substance of the arrangements, and fasten responsibility on the parties according to their true and real character.’ L. R. 4 P. C. 438. But in the case at bar no such element is found.

“Throughout the original agreement, and the renewals thereof, the sum of \$10,000 paid by Perry to the partnership, and for which they gave him their promissory notes, is spoken of as a loan for which the partnership was to pay him legal interest at all events, and also pay him one-tenth of the net yearly profits of the partnership business, if those profits should exceed the sum of \$10,000. The manifest intention of the parties, as apparent upon

the face of the agreement, was to create the relation of debtor and creditor, and not that of partners. Perry's demanding and receiving accounts and payments yearly was in accordance with his right as a creditor. There is nothing in the agreement itself, or in the conduct of the parties, to show that he assumed any other relation. He never exercised any control over the business. The legal effect of the instrument could not be controlled by the testimony of one of the partners to his opinion that 'it was capital he had in the business the same as ours; we owed it to him; of course, we owed it to him if we did not lose it.'

"Upon the whole evidence, a jury would not be justified in inferring, on the part of Perry, either 'actual participation in the profits as principal,' within the rule as laid down by this Court in *Berthold v. Goldsmith*, or that he authorized the business to be carried on in part for him or on his behalf, within the rule as stated in *Cox v. Hickman* and the later English cases. There being no partnership, in any sense, and Perry never having held himself out as a partner to the plaintiff or to those under whom he claimed, the Circuit Court rightly ruled that the action could not be maintained. *Pleasants v. Fant*, 22 Wall. 116; *Thompson v. Bank*, 111 U. S. 529, 4 Sup. Ct. Rep. 689.—*Judgment affirmed.*"

Question 561: (1.) Is the fact that the parties share the profits of a business conclusive to establish them partners so that the act of one in the scope of the business will bind the others?

- (2.) What was the early test of a partnership?
- (3.) Is the agency test a good test? Why?
- (4.) In the above case, was Perry held as partner?
- (5.) What is the test of a partnership?
- (6.) If there is a partnership are all members liable on partnership transactions, whether the creditor knew of the partnership or not?
- (7.) A had a farm which he wanted worked and entered into an agreement with B that B should take possession and operate the farm for a certain season, B to furnish his own utensils, and A to have in lieu of a fixed rental one-third of the net profits of

the season. Is there a partnership? (Randall v. Ditch et al., 123 Ia. 582.)

(8.) A had a store for which he desired a manager. He employed B, giving B authority to conduct the store, sell goods and replenish the stock. B conducted the store, buying goods in A's name. B's compensation consisted entirely in a percentage of the profits. A failed. B is sued as a partner for goods bought for the store. Is he liable? Why?

(Note: It was laid down by the early English cases that "He who takes a moiety of all the profits indefinitely shall, by operation of law, be liable for losses, if losses arise." Waugh v. Carver, 2 H. Blackstone, 235; Grace v. Smith, 2 W. Blackstone, 998. In Cox v. Hickman, 8 House of Lord's Cases, 268, decided in 1860, this doctrine was declared unsound. Different tests have been proposed, but the better view is that there is a partnership (no matter what name the parties give to the relationship) when there is an intention to make each other *co-owners* in a business conducted with a view to profit. There may be a mutual interest in the profits without any co-ownership in the business. Being mutual owners, and therefore all principals, each is an agent for the other. If parties are actually partners, they are liable whether at the time known to be so or not. Thus a secret partner is liable for partnership indebtedness incurred while he was actually a partner. If parties are interested in the profits, but not actually partners, they are not liable, *unless* there was a "holding out," that is unless the party is by his representations or conduct estopped to say there is no partnership. For exhaustive note entitled "Effect of agreement to share profits to create a partnership," see 18 Lawyers Report Annotated, new series, 963.)

Case No. 562. Ash v. Guie, 97 Pa. 493.

Facts: Suit brought against a large number of persons as members of a Masonic lodge upon a certificate of indebtedness which had been issued by the master and the warden upon an indebtedness arising out of the erection of a building. These members were sought to be held responsible as partners.

Point Involved: Whether the members of a benevolent order, not formed for financial profit, are partners and as such agents of each other within the scope of partnership purposes.

TRUNKEY, J.: "One of the defendants, called by plaintiffs, testified: 'The full title of our lodge is Williamson Lodge, No. 309, F. and A. M. F. and A. M. means Free and Accepted Masons. The purposes of our lodge are charitable, benevolent and social.' This is the evidence as to the objects for which the association was formed, and without proof of its constitution or rules respecting admission of members and the management of its affairs, it was held to be a common partnership. A partnership has been defined to be a 'combination by two or more persons, of capital or labor or skill, for the purpose of business for their common benefit.' It may be formed, not only for every kind of commercial business, but for manufacturing, hunting, and the like, as well as for carrying on the business of professional men, mechanics, laborers, and almost all other employments. It would seem that there must be a community of interests for business purposes. Hence voluntary associations or clubs, for social and charitable purposes, and the like, are not proper partnerships, nor have their members the powers and responsibilities of partners. Pars. on Part. 6, 36, 42.

"A benevolent and social society has rarely, if ever, been considered a partnership. * * *

"Here there is no evidence to warrant an inference that when a person joined the lodge he bound himself as a partner in the business of purchasing real estate and erecting buildings, or as a partner so that other members could borrow money on his credit. The proof fails to show that the officers or a committee, or any number of the members, had a right to contract debts for the building of a temple, which would be valid against every member from the mere fact that he was a member of the lodge. But those who engaged in the enterprise are liable for the debts they contracted, and all are included in such liability who assented to the undertaking or subsequently ratified it. Those who participated in the erection of the building by voting for and advising it, are bound the same as the committee who had it in charge. And so

with reference to borrowing money. A member who subsequently approved the erection or borrowing could be held on the ground of ratification of the agents' acts. We are of opinion that it was error to rule that all the members were liable as partners in their relation to third persons in the same manner as individuals associated for the purpose of carrying on a trade. * * *

Question 562: (1.) Why was the lodge not deemed to be a partnership?

(2.) How could the members of this club have made themselves liable for the acts of other members?

(Note: A provision by one co-owner indemnifying the other against loss does not prevent a partnership. The test would be whether they are really co-owners of a business carried on for profit. That being true, each is liable to third person for the debts of the partnership, and such third person is not concerned with matters of indemnity between themselves.)

Sec. 405. Partnership by Estoppel.

Case No. 563. Thompson v. First National Bank, 111 U. S. 536.

Facts: Suit to hold one as a partner who had appeared in public advertisements to be a partner, but who was not really such. The "holding out" was not known to plaintiff at the time of the transaction.

Point Involved: Of the estoppel that will impose on one the liability of a partner, when he is not really a partner.

"The Court was requested to instruct the jury that if Thompson was not in fact a member of the partnership, the plaintiff could not recover against him, unless it appeared from the testimony that he had knowingly permitted himself to be held out as a partner, and that the plaintiff had knowledge thereof during its transaction with the partnership. The Court declined to give this instruction, and instead thereof instructed the jury, in substance, that if Thompson permitted himself to be held

out to the world as a partner, by advertisements and otherwise, as shown by the evidence, and to be introduced to other persons as a partner, the plaintiff was entitled to the benefit of the fact that he was so held out, and he was estopped to deny his liability as a partner, although the plaintiff did not know that he was so held out, and did not rely on him for the payment of the plaintiff's debt, or give credit to him, in whole or in part. This Court is of opinion that the Circuit Court erred in the instructions to the jury, and in the refusal to give the instruction requested.

“A person who is not in fact a partner, who has no interest in the business of the partnership and does not share in its profits, and is sought to be charged for its debts because of having held himself out, or permitted himself to be held out, as a partner, cannot be made liable upon contracts of the partnership except with those who have contracted with the partnership upon the faith of such holding out. In such a case, the only ground of charging him as a partner is that, by his conduct in holding himself out as a partner, he has induced persons dealing with the partnership to believe him to be a partner, and, by reason of such belief, to give credit to the partnership. As his liability rests solely upon the ground that he cannot be permitted to deny a participation which, though not existing in fact, he has asserted, or permitted to appear to exist, there is no reason why a creditor of the partnership, who has neither known of nor acted upon the assertion or permission, should hold as a partner one who never was in fact, and whom he never understood or supposed to be, a partner, at the time of dealing with and giving credit to the partnership. There may be cases in which the holding out has been so public and so long continued that the jury may infer that one dealing with the partnership knew it and relied upon it, without direct testimony to that effect. But the question whether the plaintiff was induced to change his position by acts done by the defendant or by his authority is, as in other cases of estoppel *in pais*, a question of fact for

the jury, and not of law for the Court. The nature and amount of evidence requisite to satisfy the jury may vary according to circumstances. But the rule of law is always the same; that one who had no knowledge or belief that the defendant was held out as a partner, and did nothing on the faith of such a knowledge or belief, cannot charge him with liability as a partner if he was not a partner in fact."

Question 563: On what ground may one be held to be liable as a partner to third persons, where he is not a partner in fact? What are the essential elements in such a case?

Sec. 406. Kinds of Partnerships.

- (a) Trading and non-trading partnerships.
- (b) Limited and unlimited partnerships.
- (c) Joint stock companies.
- (d) General and special partnerships.

(a) Trading and Non-trading Partnerships.

(Note: See *Judge v. Braswell*, *post*, case No. 581. Partnerships are known as those which are trading and those which are non-trading. A trading partnership is one which as its main business, *buys* and *sells*. It includes the great bulk of commercial partnerships. A non-trading partnership does not buy and sell as its main business. Such are partnerships of lawyers, physicians, farmers, laundrymen, hotel keepers, and the like. The distinction is important as determining the apparent or implied power of one partner to bind the other.)

(b) Limited and Unlimited Partnerships.

(Partnerships are called limited, when any member thereof by agreement has limited his liability for losses. Such agreement is effective between the parties, but not as to third persons.

Under statutes in some jurisdictions limited partnerships may be formed, in which the capital only of the firm is liable for debts, that is, there is no personal liability apart from subscrip-

tions. Such partnerships must strictly comply with the technical requirements of the law or they will be held general partners.)

(c), Joint Stock Companies.

Case No. 564. People v. Rose, 219 Ill. 46.

Point Involved: The nature of a joint stock company.

MR. JUSTICE MAGRUDER: “* * * A joint stock company is defined in the text books to be ‘an association of individuals for purposes of profit, possessing a common capital, which is divided into shares, of which each member possesses one or more, and which are transferable by the owner. These associations, formed for business purposes, were at common law, and, as a general rule still are considered merely as partnerships, and their rights and liabilities are in the main governed by the same rules and principles which regulate commercial partnerships.’ (17 Am. & Eng. Ency. of Law [2d Ed.], pp. 636, 637). While it is true that many companies, called joint stock companies, have many of the essential characteristics of a corporation, yet there is a distinction between such companies and regularly organized corporations, so-called. In 17 Am. & Eng. Ency. of Law, (2d Ed.), p. 638, it is said: ‘In respect to their formation there is a broad distinction between a corporation, technically so called, which always owes its existence to the sovereign power of the state, and a joint stock company, which, being essentially a partnership, is brought into being by the contracts of its members *inter sese*.’ Counsel refer to cases in other states, and in the Federal courts, holding that joint stock companies possess many of the characteristics of corporations, but the definition, which characterizes them as partnerships, has been recognized as correct, if not actually adopted, by the decisions of the Illinois courts.

Question 564: What is a “joint stock company?” How does it differ from an ordinary partnership? How does it differ from a corporation? Is it a partnership?

CHAPTER SEVENTY-FOUR

THE FORMATION OF THE PARTNERSHIP

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| § 407. The form of the partnership agreement. | § 409. Who may be partners. |
| § 408. Partnerships as result of defective incorporation. | § 410. The purpose of the partnership. |

Sec. 407. The Form of the Partnership Agreement.

(Note: The partnership may be oral or in any written form. The usual written agreement between the parties consists in "articles of partnership" defining the duties, obligations and rights of each.)

Sec. 408. Partnership as the Result of Defective Corporation.

Case No. 565. Harrill v. Davis, 168 Fed. 187, 22 L. R. A. (N. S.) 1152.

Facts: Suit by Harrill, as trustee of Western Investment Company, against Davis and three others, as partners under the name of "Coweta Cotton & Milling Company." Defendants deny personal liability, and assert that the company was a corporation. "The patent and indisputable facts in this case are that the four defendants associated themselves together, and from June, 1902, to December 22, 1902, actively engaged in purchasing lumber, material and labor of the plaintiff, and in constructing a cotton gin under the name 'The Coweta Cotton & Milling Company,' and that during this time they

incurred more than \$4,700 of the indebtedness of \$5,145.48, for which this action was brought. On December 22, 1902, they made their first real attempt to incorporate, and for the first time took on the color or appearance of a corporation. On that day they filed articles of incorporation with the clerk of the Court of Appeals, but they never filed any duplicate of them with the clerk of the judicial district in which their place of business was located, as required by the statutes in order to constitute them a legal corporation and to authorize them to do business as such [under the Arkansas laws]." (From the opinion of Judge Sanborn.)

Point Involved: That personal liability, as of partners, will attach where parties associate themselves under a fictitious name but do not at least constitute themselves a *de facto* corporation. Of the procedure necessary in order to establish a *de facto* corporation.

SANBORN, C. J.: " * * * The general rule is that parties who associate themselves together and actively engage in business for profit under any name are liable as partners for the debts they incur under that name. It is an exception to this rule that such associates may escape individual liability for such debts by a compliance with incorporation laws or by a real attempt to comply with them, which gives the color of a legal corporation, and by the user of the franchise of such a corporation in the honest belief that it is duly incorporated. When the fact appears, as it does in the case at bar, by indisputable evidence that parties associated and knowingly incurred liabilities under a given name, the legal presumption is that they are governed by the general rule, and the burden is upon them to prove that they fall under some exception to it. *Owen v. Shepard*, 8 C. C. A. 244, 19 U. S. App. 336, 59 Fed. 746; *Wechselberg v. Flour City Nat. Bank*, 26 L. R. A. 470, 12 C. C. A. 56, 60, 61, 24 U. S. App. 308, 64 Fed. 90, 94; *Clark v. Jones*, 87 Ala. 474, 6 So. 362.

"Counsel for the defendants argue with much force and persuasiveness that they escape liability because they

became a corporation *de facto*, although they concede that they never became a corporation *de jure*; and in support of this position they cite, among other cases: (Citing Cases.) But in every one of these authorities articles of incorporation had been filed under a general enabling act, or a charter had been issued, and there had been a user of the franchise of the supposed corporation which had been colorably created by the filing of the articles or the issue of the charter before the indebtedness in question was created, while nothing of this nature had been done before the debt for the \$4,700, which we are now considering, was incurred. The authorities which have been recited rest upon the proposition that where parties procure a charter or file articles of association under a general law, thereby secure the color of a legal incorporation, believe that they are a corporation, and use the supposed franchise of the corporation in good faith, and third parties deal with them as a corporation, they become a corporation *de facto* and exempt from individual liability to such third parties, although there are unknown defects in the proceedings for their incorporation. The statement of Morawetz on Private Corporations, Vol. 2, at Sec. 748, upon which counsel seem to rely, that 'if an association assumes to enter into a contract in a corporate capacity, and the party dealing with the association contracts with it as if it were a corporation, the individual members of such association cannot be charged as parties to the contract, either severally or jointly or as partners. This is equally true whether the association was in fact a corporation or not, and whether the contract with the association in its corporate capacity was authorized by the legislature or prohibited by law, and illegal'—is too broad to be sound. Parties who actively engage in business for profit under the name and pretense of a corporation which they know neither exists nor has any color of existence may not escape individual liability because strangers are led by their pretense to contract with their pretended entity as a corporation. In such cases they act as the agents of a prin-

principal that they know does not exist, and they are liable under a familiar rule, because there is no responsible principal. 2 Kent, Com. 14th ed. 630; Queen City Furniture & Carpet Co. v. Crawford, 127 Mo. 356, 364, 30 S. W. 163."

Question 565: (1.) What is a *de facto* corporation?

(2.) Why was there none in this case?

(3.) State the facts in the case above, whether the parties were here individually liable and why.

Sec. 409. Who May Be Partners.

(See Cases 15 and 16, *supra*, as to general capacity of married women and insane persons to contract.)

Case No. 566. Jennings v. Stannus, 191 Fed. 347.

Facts: For the purpose of claiming his exemptions out of the partnership property, William A. Stannus of the firm of Stannus & Son, bankrupt (there being no exemption allowed to partners out of partnership property), shows that the son is a minor, and contends that this avoids the partnership.

WOLVERTON, D. J.: " * * *

"This disposes of the principal question. It remains to determine whether the son being a minor avoids the partnership relations. An infant's agreement to enter into a co-partnership, like most other contractual obligations of his, is not void, but voidable only, and that at his instance or within a reasonable time after arriving of age. It is only such agreements as are not possibly to be regarded as beneficial to him which are null from the beginning. Partnership obligations will not, however, bind him personally, but are valid against the firm, and are entitled to payment out of the partnership assets, regardless of the minority of one of its members. These principles are well settled by uniform trend of authority: Sparman v. Keim, 83 N. Y. 245; Dunton v. Brown, 31

Mich. 182; Moley v. Brine, 120 Mass. 324; Page v. Morse, 128 Mass. 99; Gay v. Johnson, 32 N. H. 167; Bush et al. v. Linthicum, 59 Md. 344; Ex parte Taylor, 44 Eng. Reprint, 388; Goode & Benmon v. Harrison, 105 Eng. Reprint, 1147; Bates, Law of Partnership, Vol. 1, §§ 142-148.

“It follows that the partnership, where a member of the firm is a minor, continues in all respects valid until the minor has declared his privilege and has withdrawn from the firm. So that in the present case, the son having in no way, so far as the record discloses, declared his withdrawal, the partnership of William A. Stannus & Son continues valid and undissolved, except for the assignment in bankruptcy. Such being the case, the elder Stannus cannot claim his exemption out of the partnership property of William A. Stannus & Son.”

Question 566: If a minor is a member of a partnership may he withdraw therefrom at any time and demand an accounting? Is his partnership agreement void or voidable? Are partnership obligations incurred while he was a member binding on him personally? Are such obligations binding on the assets of the firm?

Case No. 567. Adams v. Beall, 67 Md. 53.

Facts: The facts are stated in the opinion.

Point Involved: The right of an infant partner to withdraw from the partnership and recover his capital.

ROBINSON, J.: “The appellee, while a minor, paid to the appellant \$2,900, as a consideration for being admitted as a partner in the appellant’s business. The partnership continued for more than a year, and, finding it unprofitable, the appellee, without formally dissolving the partnership, withdrew from the business. The question in the case is whether the appellee is entitled to recover of the appellant the money thus paid. His right to disaffirm the partnership contract, and to avoid all liabilities under it, including the partnership debts, is not denied. Being an infant when the contract was made,

this is a privilege to which for his protection he is entitled. But when he seeks to recover money paid for a consideration which he has enjoyed or has had the benefit of, this presents quite another question. The \$2,900 was paid to the appellant in consideration of being admitted as a partner in his business. He was admitted as a partner, and continued to be a member of the firm for at least a year. The business was not, it is true, a successful one, but this, in the absence of fraudulent representations on the part of the appellant, cannot affect the question. We are dealing with a contract between an infant and adult, executed on both sides, and upon the faith of which money was paid by the infant for a consideration which he has enjoyed. The privilege of infancy, says Lord Mansfield in *Zouch v. Parsons*, 3 Burrows 1804, was intended as a shield or protection to the infant, and not to be used as the instrument of fraud and injustice to others; and to hold that an infant has the right, not only to withdraw from a partnership at his own pleasure, and to subject the adult partner to the payment of all the partnership debts, but has the right also to recover money paid by him as a consideration for being admitted into the partnership, would be, it seems to us, to extend the privilege beyond any just principles upon which it is founded.

“ * * *

“We have quoted at length from the preceding cases, because the question at issue is an important one, and comes before us for the first time for decision. And while fully recognizing the privilege which the law accords to minors in regard to contracts made during their minority, yet, in a case like the present, where money is paid by a minor in consideration of being admitted as a partner in the business of the appellant, and he does become and remains a partner for a given time, he ought not to be allowed to recover back the money thus paid unless he was induced to enter into the partnership by the fraudulent representations of the appellant. * * *

Question 567: What was the suit in this case about? Did it prevail?

(Note: Lindley says (Lindley on Partnership, 8th Ed., p. 91) "Moreover, notwithstanding the general irresponsibility of an infant, he cannot, as against his co-partners, insist that on taking the partnership accounts he shall be credited with profits and not be debited with losses. * * * An infant partner may avoid the contract into which he has entered, either before or within a reasonable time after he becomes of age. If he avoids the contract and has derived no benefit from it, he is entitled to recover back any money paid by him * * *; but he cannot do this if he has already obtained advantages under the contract, and is unable to restore the party contracting with him to the same position as if no contract had been entered into.")

Sec. 410. The Purpose of the Partnership.

Case No. 568. Goodrich v. Tenney, 144 Ill. 422.
(Set out as Case No. 73, *supra*.)

Question 568: If a partnership is formed for illegal purposes, can one partner force an accounting from the other?

PART XXI

FIRM NAME AND PROPERTY

Chapter Seventy-five. The Firm Name.

Chapter Seventy-six. The Firm Property.

CHAPTER SEVENTY-FIVE

THE FIRM NAME

§ 411. Firm name not indispensable. § 413. Use of firm name.

§ 412. What may constitute firm
name.

Sec. 411. Firm Name Not Indispensable.

(Note: A firm name is not absolutely indispensable. If parties are actually partners, the fact that they have not adopted any name will not prevent liability to third persons or any other legal consequence of partnership.)

Sec. 412. What May Constitute Firm Name.

Case No. 569. Crawford et al. v. Collins et al., 45 Barb. 269.

Facts: Suit on a bond given by defendants to "Union Towing Company." Plaintiffs sue in their own proper names, as partners constituting the partnership under that name.

JAMES, J.: "This action was properly brought in the individual names of the plaintiffs; they were the persons who composed the firm known as the "Union Towing Company," the real owners of the debt and the legal holders of the bond. The parties to a partnership may give it just such name as they please, and all contracts, obligations or notes made with or given to such firms may be prosecuted in the individual names of its members.

"It is different with corporations; but the Union Towing Company was not a corporation. * * *"

Question 569: (1.) In the absence of statute, may the partners adopt a fictitious name?

(2.) How is suit brought by or against partners on a contract executed in a partnership name that does not disclose the names of all the partners?

(3.) A promissory note was given by W., P. and S., three partners composing a partnership under the name of W. & P. The three partners, W., P. and S. are sued thereon. S. defends he was not a party to the note. Assuming he is really a partner and that the note is a partnership note, is his defense good? (Swan v. Steele, 7 East. 210.)

Case No. 570. North v. Moore, 135 Cal. 621.

Facts: Suit by certain parties as partners trading as Abrams Bros. Defense, that Abrams Bros. have not complied with California law requiring every partnership transacting business under fictitious name or a designation not showing the names of the persons interested, to file with clerk of county court a certificate showing real names and make publication thereof in some newspaper, etc.

Point Involved: The necessity of complying with statutory regulations enacted in some states with reference to use of firm name not showing the real names of the parties interested.

CHIPMAN, C.: "* * * The firm name might apply equally to a partnership composed of two or more and might embrace all or only some of the brothers by the

name of Abrams. The statute clearly defeats their rights to maintain an action * * *."

Question 570: Under what authority was the defense made in this case? Why could not such defense have been made in the case immediately preceding?

(Note: Such provisions are in force in some, but not in all the states.)

Sec. 413. Use of Firm Name.

(See the foregoing cases in this chapter; also the following in this section.)

Case No. 571. Hendren v. Wing, Stephens and Eggleston, 60 Ark. 561.

Facts: Suit to reclaim personal property mortgaged to plaintiffs naming them as the Arkansas Machinery & Supply Company. Defense, that this name is not the name either of a natural person or a corporation.

RIDDICK, J.: "The Arkansas Machinery & Supply Company is not a corporation, but it is the business name of a firm of partners. The question for us to determine is whether a chattel mortgage, executed to it, as such partnership, is valid at law. The decisions in regard to transfers of real estate to partnerships are based on the old rule that 'a partnership, as such, cannot at law be the grantee in a deed, or hold real estate.' Percefull v. Platt, 36 Ark. 464. This rule does not apply to personal property. On the contrary, a partnership, as such, can at law be the vendee in a bill of sale or other conveyance of personal property. The custom of the country teaches us that this is so. The business of the country is largely carried on by partners under partnership names which frequently do not contain the name of any person. * * * A consideration of this fact shows that there is a wide distinction between the rights

of partnerships at law, in regard to buying and selling of personal property and the restrictions that prevail there in regard to transfers of real estate * * *."

Question 571: (1.) What was the question raised in this case?

(2.) Was the subject matter real or personal property?

(3.) In the opinion of the Court did the nature of the property as personal or real make a vital distinction?

Case No. 572. Percefull and wife v. Platt, 36 Ark. 456.

Facts: Deed to real estate to George F. Lovejoy & Co. Platt sues in ejectment under this deed asserting that he is the surviving partner of George F. Lovejoy & Co., and as such surviving partner succeeds to the title of the firm. An ejectment is an action at law on strictly legal title without assistance from equitable claims.

Point Involved: In a deed of conveyance of real estate to a grantee named by a partnership name not containing the names of all of the partners, in whom is the legal title under such deed?

EAKIN, J.: " * * *

"A partnership, as such, can not, at law, be the grantee in a deed, or hold real estate. The legal title must vest in some person, and a partnership is not a corporation. If the title be made to all the partners by name, they hold the legal title as tenants in common, without survivorship. If to one partner alone, the whole legal title vests in him, which is the case, also, where the title is to a partnership name, which, as in this case, expresses the name of one party only, with the addition of "& Co." If the deed be to a name adopted as the firm style, which includes the name of no party, it passes nothing in law. The same occurs where the deed is to one already dead.

"Different rules prevail in equity, which considers the real purpose of the acquisition, and, by the machinery of trusts, converts real estate, held for partnership purposes, into personalty, so far as may be necessary to set-

tle all the equities between the firm and its creditors, and between the partners themselves. What is left, after that, goes as real estate, equitably amongst all, regardless of the accidental position of the legal title. The case before us does not require us to deal with these equities at present.

“That Platt was a surviving partner did not give him, at law, any additional rights to lands held by both, even if held as partnership property. There is no survivorship in such estates at law. Upon the death of a partner, the legal estate in a survivor remains as before. That of the deceased goes to his heirs. Each holds as trustee of the partnership and of each other.

“And, where the whole legal estate was in the deceased, it goes, all, to his heirs, and nothing to the survivor, save his equities. These principles are elementary, and may be found in all the text-books.

“If, as he alleges, the lands were purchased by said firm, at execution sale, and a deed taken from the sheriff to the firm, it would have vested the whole legal title in Lovejoy, whose name is the only one revealed by the firm style. *Gossett et al. v. Kent et al.*, 19 Ark. 602; *Moreau v. Safferans*, 3 Sneed, 595; Wash. on R. Prop., vol. 1, mar. p. 422.

“The purchase, by plaintiff, of Lovejoy’s interest in the judgment, had no effect on the title to the land acquired under it. Nor could plaintiff acquire any title to sustain the action by means of the deed from Lovejoy’s administrator executed after suit began.

“Conceding all that is stated in the complaint, there is nothing in the pleadings or record upon which the judgment can be supported. Even if the title had been jointly in plaintiff and Lovejoy, it would not justify a judgment for the whole in favor of the former as survivor.”

Question 572: What was the firm name in this case? How did the firm acquire the property? Did plaintiff recover? Why?

CHAPTER SEVENTY-SIX

THE FIRM PROPERTY

§ 414. As distinguished from firm capital. § 415. What constitutes firm property.

Sec. 414. As Distinguished from Firm Capital.

(Note: The capital and the property of the firm must be distinguished as in the case of a corporation. The firm capital is a certain fixed amount, [changeable by agreement] which the partners pay in as their share of the fund with which the partnership may carry on its business. See later subjects for questions arising in respect to the capital.)

Sec. 415. What Constitutes Firm Property.

Case No. 573. Robinson Bank v. Miller, 153 Ill. 244.

Facts: Suit to determine whether certain land belonged individually to partners or to the partnership. The land was bought by the parties in undivided ownership before the partnership was formed between them. It was not bought with partnership funds, but with individual funds, and entries were not made on the firm books showing that the land was regarded as partnership capital. The land was, however, used for firm purposes, that of conducting a mill, and the firm paid for repairs and new machinery on the mill.

Point Involved: When property is to be regarded as firm property or the property of the partners in their individual capacity.

MR. JUSTICE MAGRUDER: “* * *

“Whether real estate, upon which a partnership transacts its business, is firm property or the property of the individual members of the firm, is oftentimes a difficult question to determine, and one upon which the authorities are not altogether uniform.

“The mere fact of the use of land by a firm does not make it partnership property. (*Goepper v. Ginsinger*, 39 Ohio St. 429; *Hatchett v. Blanton*, 72 Ala. 423.) Nor is real estate necessarily the individual property of the members of a firm because the title is held by one member or by the several members in undivided interests. (1 *Bates on Law of Partnership*, sec. 280.) Whether real estate is partnership or individual property depends largely upon the intention of the partners. That intention may be expressed in the deed conveying the land, or in the articles of partnership; but when it is not so expressed, the circumstances, usually relied upon to determine the question, are the ownership of the funds paid for the land, the uses to which it is put, and the manner in which it is entered in the accounts upon the books of the firm. (1 *Bates on Law of Part.* sec. 280; 2 *Lindley on Part.* marg. page 649; 17 *Am. & Eng. Enc. of Law*, page 945, and cases in note.)

“Where real estate is bought with partnership funds for partnership purposes, and is applied to partnership uses, or entered and carried in the accounts of the firm as a partnership asset, it is deemed to be firm property; and, in such case, it makes no difference, in a court of equity, whether the title is vested in all the partners as tenants in common, or in one of them, or in a stranger. (*Parsons on Part.*—4 ed.—sec. 265; 1 *Bates on Law of Part.* sec. 281; *Johnson v. Clark*, 18 Kans. 157; 17 *Am. & Eng. Enc. of Law*, page 948, and cases cited.) If the real estate is purchased with partnership funds, the party holding the legal title will be regarded as holding it subject to a resulting trust in favor of the firm furnishing the money. In such case no agreement is necessary; and the statute of frauds has no application. (*Barker v. Bowles*, 57 N. H. 491; 1 *Bates on Law of Part.* sec. 281.)

“In the case at bar, the land was not purchased with partnership funds. * * * Each partner here held the title to an undivided one-third part of the property. No entries were made upon the books of the firm, showing that the real estate was treated as firm assets. The evidence, however, does show that the property was bought for the purpose of being used in the milling business, and that, after its purchase, it was used for firm purposes, and that the firm gave its notes to pay for the repairs and for placing new machinery in the mill upon the premises. Under these circumstances, was the land partnership property, or the individual property of the partners holding as tenants in common?

“It cannot be said, that the land is firm property upon the theory of a resulting trust, because the money of the firm was not used to buy the property. Such a trust might exist in favor of the firm, regarding it as a person, if the partners had taken the legal title, and the firm had advanced the purchase money. The trust must arise at the time of the execution of the conveyance, and when the title vests in the grantee. Such could not have been the case here under the facts stated. (*Van Buskirk v. Van Buskirk*, 148 Ill. 9.) In view of the fact, that the land was bought with individual, and not partnership, funds, and was conveyed in undivided interests to the several partners, and in the absence of any agreement that it should be regarded as firm property, does the conduct of the parties in afterwards forming a partnership, and using the property for partnership purposes, and repairing and improving the mill at the expense of the firm, make the land firm property in a court of equity? A negative answer to this question is found in many authorities as will be seen by reference to the following: *Alexander v. Kimbro*, 49 Miss. 529; *Thenot v. Michel*, 28 La. Ann. 107; *Reynolds v. Ruckman*, 35 Mich. 80; *Parker v. Bowles*, 57 N. H. 491; *Thompson v. Bowman*, 6 Wall. 316; *Frink v. Branch*, 16 Conn. 260; *Wheatley's Heirs v. Calhoun*, 12 Leigh. 264; *Sikes v. Work*, 6 Gray, 433;

Gordon v. Gordon, 49 Mich. 501; Moody v. Rathburn, 7 Minn. 89; Paige v. Paige, 71 Iowa, 318; Parsons on Part. (4th ed.) sec. 266; Hanchett v. Blanton, *supra*. The general doctrine of all these cases is, that a purchase of the land with partnership funds is necessary to make it firm property. Parsons in his work on Partnership (4th ed.) says: 'Although it (real estate) be held in the joint name of two or more persons, if there be no proof that it was purchased with partnership funds for partnership purposes, it will be considered as held by them as joint tenants, or tenants in common; * * * So, if not paid for by partnership funds, then it is probably his property who does pay for it, whatever use he permits to be made of it.' (Secs. 265, 266.) In Hanchett v. Blanton, *supra*, the Supreme Court of Alabama says: 'Steering clear of all cases of fraud or of the use by one partner, without the approbation of his associates, of partnership funds in the acquisition of real estate, the two facts must concur to constitute real estate partnership property—acquisition with partnership funds, or on partnership credit, and for the uses of the partnership.' In Thompson v. Bowman, *supra*, the Supreme Court of the United States says: 'In the absence of proof of its purchase with partnership funds for partnership purposes, real property standing in the names of several persons is deemed to be held by them as joint tenants, or as tenants in common.' (Buchan v. Sumner, 2 Barb. Ch. 165.)

"There are cases which hold, that even though the land was originally bought by the several partners with their individual funds, and deeded to them as tenants in common, yet it will be regarded in equity as firm property where it is improved out of partnership funds for firm purposes and actually used for such purposes, or where the firm puts valuable and permanent improvements upon it for firm purposes, and which are essential to the firm. In some instances the land is held to be the property of the partners, and the improvements to be the property of the firm. (1 Bates on Law of Part. secs. 281, 282.) The use of the property is not conclusive of

its character as real estate or personalty, but is only evidence of the intention of the parties. (*Idem*, sec. 285.) When the intention of the partners to convey the land into firm property is inferred from circumstances, the circumstances must be such as do not admit of any other equally reasonable and satisfactory explanation. (*Parsons on Part.* sec. 267.) And where it is sought to show a conversion of the land into personalty by agreement of the partners, such agreement must be clear and explicit. (17 *Am. & Eng. Enc. of Law*, page 954, and cases cited.)

“ * * *

“The weight of authority seems to us to support the position that, where persons, who afterwards become partners, buy land in their individual names, and with their individual funds, before the making of a partnership agreement, the land will be regarded as the individual property of the partners, in the absence of a clear and explicit agreement subsequently entered into by them to make it firm property, or in the absence of controlling circumstances which indicate an intention to convert it into firm assets. We do not think that an application of this rule to the facts of the present case shows the real estate here in controversy to be firm property. The testimony proves affirmatively that there was no agreement, written or verbal, to put the land into the firm as a firm asset, and that it was treated by the parties as individual property.”

Question 573: Discuss generally the question. When is real estate used?

(Note: The partner's interest in the firm property, whether personal or real, is thus stated, “The real interest of a partner in the join property is a moiety of the surplus that may remain after the joint debts are discharged.” *Newhall v. Buckingham*, 14 Ill. 405. [Set out as Case No. 597, *post.*])

PART XXII

MUTUAL RIGHTS AND OBLIGATIONS OF PARTNERS

Chapter Seventy-seven. Partners Must Act Toward
Each Other in Good Faith.

Chapter Seventy-eight. Sundry Rights of Partners in
Going Concern.

CHAPTER SEVENTY-SEVEN

PARTNERS MUST ACT TOWARD EACH OTHER IN GOOD FAITH

§ 416. Good faith in dealing with partners.

§ 418. Obligation not to compete with firm.

§ 417. Acquisition of interests adverse to those of firm.

§ 419. Duty of partner to keep books of account.

Sec. 416. Good Faith in Dealing with Partners.

Case No. 574. Jones v. Dexter, 130 Mass. 380.

Facts: A bill was brought by Jones against Dexter and two other parties for a settlement of the partnership affairs. Jones and Dexter had been partners but the firm had been dissolved and Jones had become insolvent. Dexter some years later in order to close up the firm's affairs advertised an auction sale of all the remaining assets of the firm. Among these was an interest in a

whaling vessel which had been destroyed. This interest was offered for sale and one LeBaron bid \$12 and the interest was sold to him for that price. It appeared that LeBaron was acting for Dexter and assigned his interest to Dexter. Later the sum of \$1,564.00 was paid for the interest in the vessel by the commissioners on the "Alabama Claims." The complainant claimed as a partner a share in this sum.

Point Involved: The good faith that is necessary for each partner to show toward the other.

SOULE, J.: "The general rule is familiar that a trustee will not be permitted to make a profit out of the trust property; and that if he purchases it, even at a public auction, he will hold it for the benefit of the *cestui que trust*, and, if any profit is made upon it, he must account for it as trustee. Perry on Trust, Sec. 427. This rule applies to cases where one deals with property as agent for another, and to all those cases in which confidence is reposed, and one has it in his power, in a secret manner, for his own advantage to sacrifice the interests which have been entrusted to him. Story Eq. Jur. Sec. 323. In all such cases, the *cestui que trust* has his election to avoid the transaction which was intended to benefit the trustee, and to treat the subject matter of the trust as if no change had been made in its situation, so long as the trustee has not disposed of the property to a *bona fide* holder for value. Wyman v. Hooper, 2 Gray, 141.

"The application of this principle to the case at bar is plain. The defendant Dexter was acting for himself and his former partner, and the assignee in bankruptcy of his partner, in closing up the affairs of the partnership. When he undertook to sell the interest of the partnership in the Ocean Rover and its outfits and catchings, he had no right, as against the other parties in interest, to make a secret arrangement by which a stranger should purchase the interest for him. And when the purchase was made in accordance with that secret arrangement,

and the interest, after being conveyed to the purchaser, was conveyed by him to Dexter in pursuance of the secret arrangement, Dexter held it for the benefit of the partnership, and not for his personal benefit.

"We have assumed, in what we have said, that such secret arrangement was made and acted on, because we are of opinion that the agreed facts and evidence call for a finding to that effect. Such finding is a sufficient foundation for a decree against the defendants.

"It has already been decided that, inasmuch as the debts which the plaintiff owed when he went into insolvency have been paid, and his assignee in insolvency disclaims all interest in the subject matter of the suit, and assents to the maintenance of the bill, the plaintiff, if anyone, is entitled to the relief asked for. *Jones v. Dexter*, 125 Mass. 469. The result is, that the decree appealed from must be affirmed."

Question 574: (1.) What did the partner do in this case that was a wrong against the other partner? What remedy did the wronged partner have?

(2.) "Four partners established a partnership for refining sugar; one of them is a wholesale grocer and from his business is peculiarly cognizant with the variations in the sugar market, and has great skill in buying sugar at a right and proper time for the business. Accordingly the business of selecting and purchasing the sugar for the sugar refinery is entrusted to him. * * * Having according to his skill and knowledge bought sugar at a time when he thought it likely to rise, and it having risen and the firm being in want of some, he sells his own sugars to the firm without letting the partners know that it was his own sugar that was sold." Are the partners entitled to this profit? *Bentley v. Craven*, 18 Beav. (Eng.) 75.

Sec. 417. Acquisition of Interests Adverse to Those of Firm.

Case No. 575. *Mitchell v. Reed*, 61 N. Y. 123.

Facts: Suit brought to have a certain lease held by one partner to be declared the property of the partner-

ship. The plaintiff and the defendant had entered into a co-partnership in the hotel business operating the Hoffman House in New York. The partnership expired by its terms on May 1, 1871, at which time also the lease on the property terminated. The firm spent large sums of money in improving the property and thereby increased the rental value very much. In 1869 the defendant without the knowledge of his co-partners obtained a new lease of the Hoffman House in his own name for a term commencing May 1, 1871, when the old lease expired. Plaintiff contends that his acquisition of the lease should be deemed for the benefit of the firm as a whole and that he should be held as a trustee for the firm.

EARL, C.: "The relation of partners with each other is one of trust and confidence. Each is the general agent of the firm, and is bound to act in entire good faith to the other. The functions, rights and duties of partners in a great measure comprehend those both of trustees and agents, and the general rules applicable to such characters are applicable to them. Neither partner can, in the business and affairs of the firm, clandestinely stipulate for a private advantage to himself. Every advantage which he can obtain in the business of the firm must inure to the benefit of the firm. These principles are elementary, and are not contested. Story, No. 174,175; Collyer, 181, 182. It has been frequently held that when one partner obtains the renewal of a partnership lease secretly, in his own name, he will be held a trustee for the firm as to the renewed lease. It is conceded that this is the rule where the partnership is for a limited term, and either partner takes a lease commencing within the term; but the contention is that the rule does not apply where the lease thus taken is for a term to commence after the expiration of the partnership by its own limitation, and whether this contention is well founded is one of the grave questions to be determined upon this appeal.

"It is not necessary, in maintaining the right of the

plaintiff in this case, to hold that in all cases a lease thus taken shall inure to the benefit of the firm, but whether, upon the facts of this case, these leases ought to inure to the benefit of this firm. I will briefly allude to some of the prominent features of this case. These parties had been partners for some years; they were equal in dignity, although interest differed. The plaintiff was not a mere subordinate in the firm, but so far as appears, just as important and efficient in its affairs as the defendant. They procured the exclusive control of the leases of the property to terminate May 1, 1871, and their partnership was to terminate on the same day. They expended many thousand dollars in fitting up the premises, a portion thereof after the new leases were obtained, and they expended a very large sum in furnishing them. By their joint skill and influence they built up a very large and profitable business, which largely enhanced the rental value of the premises. More than two years before the expiration of their leases and of their partnership, the defendant secretly procured, at an increased rent, in his own name, the new leases, which are of great value. Although the plaintiff was in daily intercourse with the defendant, he knew nothing of these leases for about a year after they had been obtained. There is no proof that the lessors would not have leased to the firm as readily as to the defendant alone. The permanent fixtures, by the terms of the leases at their expiration, belonged to the lessors. But the movable fixtures and the furniture were worth vastly more to be kept and used in the hotel than to be removed elsewhere. Upon these facts I can entertain no doubt, both upon principle and authority, that these leases should be held to inure to the benefit of the firm. If the defendant can hold these leases, he could have held them if he had secretly obtained them immediately after the partnership commenced, and had concealed the fact from the plaintiff during the whole term. There would thus have been, during the whole term, in making permanent improvements and in furnishing the hotel, a conflict between his duty to the firm and his self-

interest. Large investments and extensive furnishing would add to the value of his lease, and defendant would be under constant temptation to make them. While he might not yield to the temptation, and while proof might show that he had not yielded, the law will not allow a trustee thus situated to be thus tempted, and therefore disables him from making a contract for his own benefit. *Terwilliger v. Brown*, 44 N. Y. 237, and cases cited.

“It matters not that the Court at special term found upon the evidence that the improvements were judicious and prudent for the purposes of the old term. The plaintiff was entitled to the unbiased judgment of the defendant as to such improvements, uninfluenced by his private and separate interest. But further, the parties owned together a large amount of hotel property in the form of furniture and supplies, considerably exceeding, as I infer, \$100,000 in value. Assuming that the partnership was not to be continued after the 1st day of May, 1871, this property was to be sold, or in some way disposed of for the benefit of the firm and each partner owed a duty to the firm to dispose of it to the best advantage. Neither could, without the violation of his duty to the firm, place the property in such a situation that it would be sacrificed, or that he could purchase it for his separate benefit at a great profit. Much of this property, such as mirrors, carpets, etc., was fitted for use in this hotel, and it is quite manifest that all of it would sell better with a lease of the hotel, than it would to be removed therefrom. It is clear that one or both of these parties could obtain advantageous leases of the hotel for a term of years, and hence, if the parties had determined to dissolve their partnership, it would have been a measure of ordinary prudence to have obtained the leases and transferred the property with the leases as the only mode of realizing its value. This was defeated by the act of the defendant, if he is allowed to hold these leases, and thus place himself in a position where the property must be largely sacrificed or purchased by himself at a great advantage. This the law will not tolerate.

"It has long been settled by adjudications, that generally when one partner obtains the renewal of a partnership lease secretly, in his own name, he will be held a trustee for the firm, in the renewed lease, and when the rule is otherwise applicable, it matters not that the new lease is upon different terms from the old one, or for larger rent, or that the lessor would not have leased to the firm. The law recognizes the renewal of a lease as a reasonable expectancy of the tenants in possession and in many cases protects this expectancy as a thing of value. I will briefly notice a few of the cases upon this subject. (Here the Court reviews numerous authorities.) * * *

"* * * I therefore conclude that it makes no difference that these leases were obtained for a term to commence after the partnership, by its own limitation, was to terminate. I can find no authority holding that it does, and there is no principle sustaining the distinction claimed. The defendant was in possession as a member of the firm, and the firm owned the good will for a renewal which ordinarily attaches to the possession. By his occupancy, and the payment of the rent, he was brought into intimate relations with the lessors; he became well acquainted with the value of the premises, and he took advantage of his position during the partnership, secretly to obtain the new leases. He must hold them for the firm."

Question 575: The defendant in this case conceded what with reference to renewals of partnership leases? How did he seek to distinguish this case from the rule admitted by him? What did the Court hold in answer thereto? Show why the acquisition of the lease in this case might be contrary to the other partner's interest.

Sec. 418. Obligation Not to Compete with Firm or Devote His Time to Other Interests.

Case No. 576. Metcalf v. Bradshaw, 145 Ill. 124.

Facts: Complainant asks an accounting against de-

fendant alleging that they were partners in the practice of the law under an agreement that each should give his time, talents and strength in prosecuting the interests of the firm. During the term of the partnership the defendant was appointed and acted as executor of several estates receiving certain fees therefor which complainant claims to be partnership earnings.

Point Involved: The duty of the partner to devote his time to the business of the partnership and not to compete with it or enter into activities derogatory to his attention to the interests of the firm. Whether in this case, specifically, acting as executor was practicing law, the fees for which were to be considered partnership earnings.

BAILEY, C. J.: “* * *

“Whether the administration of these estates is to be regarded as firm business, and the commissions received by the defendant therefor as a part of the proceeds or earnings of the business, must depend chiefly, if not wholly, upon the construction to be placed upon the partnership articles. By those articles the complainant and defendant associated themselves together ‘for the purpose of practicing law,’ and they mutually promised to give their time, talents, and strength ‘to the prosecution of the interest of the firm.’ Each pledged himself not to become a candidate for any political office, so as to become involved in politics, during the continuance of the firm, except by mutual consent: and it was agreed that any omission to keep and observe these promises and agreements by either party should justify the other in dissolving the partnership. We think it too plain for argument that accepting an appointment as executor or administrator of a deceased person, and acting as such, does not, as the term is ordinarily understood, pertain to the practice of law. Persons accepting and performing the duties of trusts of that character need not be lawyers, and, as is well known, those who are appointed as executors or administrators are, in the great majority of cases,

men who do not belong to the profession. Their duties are usually of a business, rather than a professional, character. True the administration of estates frequently requires legal advice, and often involves more or less of litigation, but substantially the same may be said of all other business pursuits, and especially of all positions involving the execution of trusts. But men are ordinarily appointed to execute trusts because of the confidence the donor of the trust has in the honor, integrity, and business capacity of the appointee, rather than because of his knowledge of legal principles, or his ability to carry on litigation with success. At all events, the execution of trusts is not, and never has been, regarded as a part of the duties peculiarly pertaining to the legal profession, or as constituting a part of what is ordinarily understood as 'the practice of the law.' It cannot, therefore, with any propriety, be claimed that the business transacted by the defendant in his trust capacity, as executor or administrator of the estates in question, was a part of the firm business, within the contemplation of the copartnership articles, or that the commissions realized by him from the execution of such trusts constituted a part of the earnings or profits of the firm.

"We are not unmindful of the well-settled rule that a partner will not ordinarily be permitted, for his own profit, to enter into business in competition with his firm. Thus he cannot, without the consent of his copartners, embark in a business that will manifestly conflict with the interests of his firm. Nor can he clandestinely use the partnership property or funds in speculations for his own private advantage, without being required to account to his copartners for the property and funds thus used, and for the profits. The general rule being that each partner shall devote his time, labor, and skill for the benefit of the firm, he cannot purchase for his own use, and for the purpose of private speculation and profit, articles in which the firm deals, and, if he does so, the profits arising therefrom may be claimed by the copartners as belonging to the firm. 5 Wait, Act & Def. 125.

Thus, as said in 1 Bates, Partn. Sec. 306: 'If a partner speculate with the firm funds or credit he must account to his copartners for the profits, and bear the whole losses of such unauthorized adventures himself; and if he go into competing business, depriving the firm of the skill, time and diligence or fidelity he owes to it, so he must account to the firm for the profits made in it. And a managing partner will be enjoined from carrying on the same business for his own benefit.' But the same author says, a little further on, that a partner may traffic outside of the scope of the business for his own benefit. So, also, in Lindl. Partn. 312, the rule is laid down as follows: 'Where a partner carries on a business not connected with or competing with that of his firm, his partners have no right to the profits he thereby makes, even if he has agreed not to carry on any separate business.'

"* * * In view of all the evidence, we are disposed to hold that the only proper result is the one reached by the Circuit Court in its decree, and the judgment of the Appellate Court, affirming the decree, will be affirmed."

Question 576: (1.) Was acting as executor by the defendant practicing law requiring an accounting of the fees thereby earned?

(2.) Did the Court think the defendant was violating his duty in acting as executor? Why?

(3.) If a partner engages in a competing business will his profits be regarded as the profits of the firm?

(4.) If he engages in a non-competing business and thereby neglects his partnership affairs will the profits he thereby makes be considered partnership earnings? In such a case would he be enjoined from carrying on such business?

(5.) A. uses \$500 of the firm money to put into a venture for his own benefit and \$500 to put into another venture for his own benefit. In the one he makes a profit of \$250. In the other he loses \$250. How much money must A. produce as partnership money?

Sec. 419. Duty of Partner to Keep Books of Account.

Case No. 577. Webb v. Fordyce, 55 Ia. 11.

Facts: See the opinion.

Point Involved: See the first paragraph of the opinion.

ROTHROCK, J.: "The sole question contended by appellant in this appeal is whether the defendant should be held liable for such of the partnership funds as came into his hands, and for which he could render no account and as to which he could but testify generally that he did not convert the same to his own use.

* * * Each checked out the funds of the partnership at will, upon his own check, and it was the duty of each to account to the firm for what he drew out. If the defendant drew checks and obtained the money thereon its expenditure was a matter peculiarly within his own knowledge. The plaintiff was entitled to some showing more than a general statement that the proceeds of the checks were used for partnership purposes. 'All partners having any charge of the business of the firm are bound to keep constantly, regular, intelligible and accurate accounts of all the business, and to give all the partners at all times access to them and to the means of verifying them.' Parsons on Partnership, p. 527.—*Affirmed.*"

Question 577: Enlarge upon the duty of the partner to keep accounts and the results from a failure to do so.

CHAPTER SEVENTY-EIGHT

SUNDRY RIGHTS OF PARTNERS IN GOING CONCERN

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| § 420. Right of partner to salary. | § 423. Right to sue firm. |
| § 421. Right to compensation for extra services. | § 424. Right to contribution and indemnity. |
| § 422. Right to interest on capital invested. | § 425. Right of majority to govern. |

Sec. 420. Right of Partner to a Salary.

(Note: The right of a partner to a salary depends entirely on agreement. There is no right to a salary unless it is so agreed between the partners. See the next case for rules governing the right to have compensation over and above a division of the profits.)

Sec. 421. Right to Compensation for Extra Services.

Case No. 578. Lindsay v. Stranahan, 129 Pa. St. 635.

PER CURIAM: "There is but a single question in this case: Is J. K. Lindsey, the plaintiff, entitled to compensation for his services as a partner? It is conceded that there was no express contract that he should be paid for such services, and there is no principle better settled than that the law will not imply a contract in such cases. The reason is that the partner is but attending to his own affairs. This rule is inexorable; as much so as that between parent and child. Were it otherwise, we might have a contest between the partners upon the settlement

of every partnership account, as to the value of their respective services. It is true this principle may work hardship in particular cases; almost every general rule does, but that is a weak argument against the soundness of the rule. When the co-partnership agreement contemplates that one partner shall manage the business, or do more than his share of the work, it is easy to provide for his compensation in the agreement itself; and if no such stipulation is then made, as before said, the law will not imply one. Even where a liquidating or surviving partner settles up the business, it has been repeatedly held that he is not entitled to compensation for doing so, although, in such case, he performs all the service: *Beatty v. Wray*, 19 Pa. 516, 57 Am. Dec. 677; *Brown v. McFarland*, 41 Pa. 129, 80 Am. Dec. 598; *Gyger's Appeal*, 62 Pa. 73, 1 Am. Rep. 382; *Brown's Appeal*, 89 Pa. 139.

“Judgment affirmed.”

Question 578: What did the Court decide in this case?

Sec. 422. Right of Partner to Interest on Capital Invested.

(Note: A partner puts in the capital for the *profits* he expects to make in the venture. Hence, there is no right to interest unless it is agreed upon.)

Sec. 423. Right of Partner to Sue Other Partners.

Case No. 579. *Bullard v. Kennedy*, 10 Cal. 60.

Facts: Suit at law by an assignee of a partner against his co-partners.

Point Involved: Whether a partner can sue his co-partners in a court at law or must go into equity and ask an accounting.

BURNETT, J.: “The only question arising in the case is, whether the plaintiff can sue in this form?

“There was nothing in the constitution of this com-

pany which regulated the remedies of the shareholders, as between themselves, and, therefore, the general law of partnership must prevail (Coll. on Partn., Sec. 1115). There having been no final settlement of the partnership accounts, and no balance struck, and no express promise on the part of the individual members to pay their ascertained portion of this amount to Sotzen and Goodnow, they could not maintain assumpsit. As they could not sue, it is difficult to see how their assignee could do so.

* * * This rule rests upon three grounds:

“1. The technical ground, that a man cannot, at the same time, in the same suit, be both plaintiff and a defendant.

“2. Because it would be useless for one partner to recover that which, upon taking a general account, he might be compelled to refund; and thus a multiplicity of suits be permitted, where one would answer.

“3. The contrary rule would defeat the equitable right of the other partners to set-off their advances against those of plaintiff, and would force them to first pay the amount, and then rely upon the individual responsibility of the partner for a return of his proportion.”

Question 579: (1.) Can a partner sue his co-partners in a court at law on a partnership account?

(2.) Does the Court suggest any exceptions?

(3.) What are the grounds given by the Court?

(4.) What is the partner's remedy?

Sec. 424. Right of Partner to Contribution.

(Note: A partner has a right to contribution from his co-partners for all expenses incurred by him in the exercise and protection of the firm business.)

Sec. 425. Right of Majority to Govern.

Case No. 580. Markle v. Wilbur et al., 200 Pa. 457.

Facts: Bill for an accounting. The bill set forth a

partnership among several parties for the purpose of mining coal upon extensive lands leased by the firm. The partnership was to begin January 1, 1890, and to continue for twenty years. Its importance and extent is shown by the fact that during the first five years over \$1,000,000. The bill alleges that expenditures were made and other acts done without authority. Defendants answer that the majority members consented to such acts. A part of the head note to the case reads as follows:

“The shares were divided into sixteenths, and the term of the partnership was for twenty years. On a bill in equity by two of the partners representing three and one-half sixteenths against the other partners for an account, it appeared that one of the plaintiffs was a woman, and the other was engaged in banking in a distant state. Three of the defendants were practical men in the coal business and one of them who acted as manager or superintendent was an educated mining engineer of large experience in his profession. The evidence showed no bad faith or fraud in the management of the business. The plaintiffs claimed that the defendants should account for a very large expenditure on a tunnel over a mile long, for the cost of a dwelling house for the superintendent, for a salary of \$10,000 a year of an assistant superintendent, and for various other matters of expenditure. The evidence showed that the large expenditure for the tunnel was due to unforeseen conditions in the strata, impossible to determine beforehand; that the house was occupied by the superintendent who paid an annual rental which equaled six per cent of its cost. As to other items explanation was made tending to show that they were necessary to carry on the business successfully and for a profit.”

Point Involved: The power of the majority in a partnership to govern the conduct of the business.

DEAN, J.: “* * * The rule laid down in Story on Partnership, Sec. 123, is stated thus:

“ ‘But another question may arise, and that is, whether,

in case of partnership, the majority is to govern in case of a diversity of opinion between the partners as to the partnership business and the conduct thereof, or whether one partner can, by his dissent, arrest the partnership business, or suspend the ordinary powers and authority of the other partners in relation thereto, against the will of the majority where there is no stipulation in the partnership articles to control or vary the result (for if there be any stipulation that ought to govern); the general rule would seem to be, that each partner has an equal voice, however unequal the shares of the respective parties may be; and the majority, acting fairly and "bona fide," have the right and authority to conduct the partnership business within the true scope thereof, and dispose of the partnership property, notwithstanding the dissent of the minority.'

"Then our own view of the law as stated by our late Brother Williams, in *Clarke v. Slate Valley Railroad Company*, 136 Pa. 408, is as follows:

" 'This leads us to consider the manner in which the business of a firm must be conducted. The firm must have its origin in the mutual confidence reposed by the persons who comprise it, in each other's skill, integrity and capacity. Its members are bound by the nature of their compact to the exercise of good faith towards each other and the common enterprise for which they have united. Differences of opinion about questions of administration are to be anticipated.

" 'It would be unreasonable to expect that all members of a partnership should see alike upon all questions, and, for that reason a mere difference of opinion about the best thing to do, or the best way of doing it, does not necessarily work a dissolution, or send the business and assets of the firm to a receiver. It was the rule of the common law that the contracts of partnership must be governed, like other agreements, by the principles of natural law and justice. It has accordingly been held that, where a firm consists of more than two persons, the majority, acting fairly and in good faith, may direct the

conduct of its affairs as long as they keep within the purpose and scope of the partnership: 2 Bouvier's Inst., Sec. 1454; Story on Part., Sec. 123. In such case, the minority must yield, so long as the majority do not transcend or pervert the powers with which the firm has been invested.. If the number of partners should in any given case be an even number and they should be evenly divided in opinion, with no provision for such a contingency in their articles, then it may be that, as to that subject, the power of the firm to act is suspended so long as the even division continues; and, if the subject be one upon which action is essential to the purposes of the partnership, such disagreement might work a dissolution by rendering the further prosecution of the common enterprise impossible. The same consequences could not flow, however, from the dissent of a minority, because, within the purpose of the partnership and for the promotion of its interests, the majority have the right to control ' ' "

[The Court upholds the acts of the majority.]

Question 580: To what extent may the majority in a partnership control?

(2.) How is the majority determined—by the number of shares held, or by the number of partners? Is the rule the same as in the case of stockholders in a corporation?

(3.) This partnership being of a very extensive character and involving a big amount of money, do you think, that would justify acts by the majority without the minority consent, which would not be justified in a smaller concern?

PART XXIII

THE PARTNERSHIP AND THIRD PERSONS

- Chapter Seventy-Nine. The Power of the Partner to Bind his Partners.
Chapter Eighty. Liability of Partner for Torts of His Co-partner.
Chapter Eighty-One. The Duration of the Liability.
Chapter Eighty-Two. Remedies of Partnership Creditors in Courts of Law.
Chapter Eighty-Three. Rights of Creditors of Partners in Courts of Equity to Firm and Individual Assets.

CHAPTER SEVENTY-NINE

THE POWER OF THE PARTNER TO BIND HIS PARTNERS

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| § 426. Introductory. | § 432. Authority to mortgage and pledge. |
| § 427. Authority of partner to purchase and sell. | § 433. Authority to pay personal debts with partnership property. |
| § 428. Authority of partner to warrant. | § 434. Authority to receive notice. |
| § 429. Authority of partner to borrow money. | § 435. Authority to make admissions. |
| § 430. Authority of partner to sign commercial paper. | |
| § 431. Authority to settle, release, receive payment, etc. | |

Sec. 426. Introductory.

(Note: The authority of the partner to bind the other partners is a question of agency as applied to a particular sort of agreement. Partners are agents of each other, and, naturally, as they are also principals and co-owners in the business, the authority that each has from the other is apparently large, and usually actually so. Powers may be conferred on an agent expressly and by implication, and, as far as third persons are concerned by giving him an appearance of power. The power may be conferred by prior act or subsequent ratification. In studying partnership authority, all of these principles are to be applied.)

Case No. 581. Judge v. Braswell, 76 Ky. 67.

Facts: Morris, Machen & Co. had a partnership agreement for mining purposes, and "said enterprise is to embrace the purchase of the title to any coal or mining lands in fee."

Machen purchased without specific authority, certain lands in the name of himself and partners, promising to pay a certain price therefor. The other partners refused to assent to the deal and are sued by the sellers.

JUDGE COPER: " * * * It seems to us that this language is clear and explicit, and that the purchase and sale of lands were within the scope of the partnership. But the articles are equally explicit that no member of the firm and no number of them less than the whole had authority to buy lands for the firm.

"It is contended, however, that the purchase of lands being within the scope of the partnership, each member had implied authority to make purchases for the firm, and that whatever may have been the rights and duties of the partners *inter esse*, and the express limitation upon their power contained in the written agreement between them, third persons dealing with a single partner, without notice of the private agreement between them, can not be affected by it.

"This is undoubtedly true as to commercial partnerships; but it is a rule of the law merchant which has been

adopted into the common law, and rests for its support upon the custom of merchants alone, and has no application to non-commercial partnerships.

“Mr. Collyer says, ‘The law of partnership, as administered in England, rests on a foundation composed of three materials—the common law, the law of merchants, and the Roman law,’ and he traces the power of one partner to bind his co-partners by a bill of exchange to the law merchant. Again he says, ‘The general principle which governs all partnerships in trade is this, that each individual partner constitutes the others his agents for the purpose of entering into all contracts for him within the scope of the partnership concern, and consequently, that he is liable to the performance of all such contracts in the same manner as if entered into personally by himself.’ (Collyer on Partnership, 103.)

“But the power of one partner thus to bind his co-partners rests alone upon the usage of merchants, and does not amount to a rule of law in any other than commercial partnerships. (Story on Partnership, Sec. 126.)

“In non-commercial partnerships one who seeks to hold the firm bound upon a contract made by a single member must be able to show either express authority, or that such is the custom and usage of that particular branch of business in which the firm is engaged, or such facts as will warrant the conclusion that the partner had been invested by his co-partners with the requisite authority, the distinction being that in commercial partnerships the extent of a partner’s power to bind the firm is a question of law, while the power of a partner in a non-commercial firm to bind his co-partners is a question of fact.

“Thus the business of a commercial partnership being ascertained, and the nature of the contract made by a single member, and the circumstances attending it being known, the Court may generally determine, as matter of law, whether the contract was within the scope of the implied powers of a partner. Not so, however, in refer-

ence to a contract made by a member of a non-commercial partnership.

“A partner in such a partnership does not generally possess power to bind the firm, and consequently, the extent of his powers is not fixed by the rules of law, but each case is left to be decided upon its particular facts; and in all such cases, in order to make out the liability of the firm, it ought to be made out affirmatively by the plaintiff that the partner had power to make the contract in question. (*Dickinson v. Valpy*, 10 B. & C. 128; *Levy v. Pyne & Richards*, 41 E. C. L. 249; *Smith v. Sloan*, 37 Wisconsin, 289.)

“In the cases at bar the authority of the partner making the contract is not shown. The partnership articles show that no such authority was thereby conferred; no evidence was offered to prove that such authority had been otherwise delegated, or that it was usual in such partnerships for one partner to buy land in the name of the firm, or that the existence of such authority was necessary in order to carry on the business for which the partnership was created, and we have seen that no such power can be implied from the mere existence of the partnership.

“We are therefore of the opinion that the Court erred in rendering judgment against the appellants, and the judgment, as to them, is reversed, and the cause is remanded with directions to dismiss the petition.”

Question 581: (1.) Where the firm is non-commercial (non-trading) what must a third person show in order to hold a partner on the acts of the other partner?

(2.) What does Mr. Collyer give as the foundation of English partnership law?

(3.) Does a member of a commercial or trading partnership have greater powers to bind the other members than in a non-trading firm? Why?

Sec. 427. Authority of Partner to Purchase and Sell.

Case No. 582. *Bond v. Gibson et al.*, 1 Campbell, 185.

Point Involved: Authority of partner in trading part-

nership to purchase goods dealt in by firm, and bind the other partner; the fact that the partner so purchasing said goods appropriates them to his own use, immaterial.

“Assumpsit for goods sold and delivered. It appeared that while the defendants were carrying on the trade of harness makers together, Jephson (one of the defendants) bought of the plaintiffs a great number of bits to be made up into bridles, which he carried away himself; but that, instead of bringing them to the shop of himself and his co-partner, he immediately pawned them to raise money for his own use.

“Gazelee, for the defendant, Gibson, contended that this could not be considered a partnership debt, as the goods had not been bought on the partnership account and the credit appeared to have been given to Jephson only. He allowed the case would have been different, had the goods once been mixed with the partnership stock, or if proof had been given of former dealings upon credit between the plaintiff and the defendants.

“Lord Ellenborough. Unless the seller is guilty of collusion, a sale to one partner is a sale to the co-partnership, with whatever view the goods may be bought and to whatever purpose they may be applied. I will take it that Jephson here meant to cheat his co-partner; still the seller is not on that account to suffer. He is innocent and he had a right to suppose that this individual acted for the partnership.”

Question 582: State the facts and what the Court held in this case.

Case No. 583. Lowman v. Sheets, 124 Ind. 417.

Facts: Templeton and Sheets were partners in conducting a stock farm for which they had acquired a herd of brood mares. Without Sheet's knowledge, Templeton purported to sell the entire herd to the plaintiff. Sheets refused to deliver the property and Lowman brought replevin.

Point Involved: Whether the member of a trading

partnership in his power to sell has the apparent authority to sell out the entire property of the firm or the property in which its capital is invested as permanent equipment.

COFFEY, J.: "It is contended by the appellant that Templeton and appellee were partners, and that, as such, either partner had the right to sell the property owned by the firm and confer a good title, and that by his purchase from Templeton he acquired the title to the whole of the property in controversy and has a right to its possession. We do not deem it necessary to decide whether the contract between the parties was one of partnership or not, as the appellant had no power to sell the entire property, whether it was held as partnership property or otherwise. The partnership, if one existed, was not one in which the parties contemplated a sale of the property here involved, but it was one in which this property was to be kept for the purpose of carrying on a particular business. In such case neither party had the power to sell the entire property: *Bates, Partn.* § 401; *Hewitt v. Sturdevant*, 4 B. Mon. (Ky.) 453; *Cayton v. Hardy*, 27 Mo. 536; *Mussey v. Holt*, 24 N. H. 248; *Hudson v. McKenzie*, 1 E. D. Smith (N. Y.) 358. Mr. Bates, in his valuable work on partnerships, in treating the subject in the section above cited, says: 'But I have no doubt but that the power of sale must be confined to those things held for sale, and that the scope of the business does not include the sale of the property held for the purpose of business and to make a profit out of it, and that this only is the true rule.' * * *"

Question 583: (1.) What were the facts in this case and the Court's decision? Give the reason.

(2.) A and B were partners in training and racing horses. A sold one of the horses. Is B bound by the sale? (*William v. Tam*, 131 Cal. 64.)

Sec. 428. Authority of Partner to Warrant.

Case No. 584. *Edwards v. Dillon*, 147 Ill. 14.

Point Involved: Whether a partner in a general trad-

ing partnership having authority to sell has authority to make ordinary warranties.

MR. JUSTICE MAGRUDER: "The firm of Levi Dillon & Sons were dealing in Norman stallions. Each partner has the power to sell these stallions, and there was involved in such power of sale the further power to warrant the quality of the horse as to its fitness for the purpose for which it was sold. Partners are considered as sanctioning the contracts which they singly enter into in the course of trade. By the act of entering into the partnership, each partner is made the general agent of his co-partners as to the firm business (*Deckard v. Case*, 5 Watts, 22). Where a general agent is employed to carry on a business the authority to sell, which is conferred upon him, may carry along with it the power to warrant, if it is usual, as it was here, to give a warranty when making a sale in such a business. (*Brady v. Todd*, 9 C. B. N. S. 591; *Biddle on Warranties in the Sale of Chattels*, Secs. 14 and 15.) A general agent employed to carry on the business of horse-dealing for his employer has an implied authority to warrant soundness when making sale of a horse (2 Benj. on Sales, marg. pages 618-620; Secs. 830, 831)."

Question 584: State what the Court held in this case.

(Note: As to the power of an agent to warrant, see also Case 211 and *note*.)

Sec. 429. Implied or Apparent Power of Partner to Borrow Money for Firm Purposes.

(Note: A partner has apparent authority to borrow money in behalf of the firm, if it is a trading firm. Lindley says (*Lindley on Partnership*, 8th Ed., p. 167): "The sudden exigencies of commerce render it absolutely necessary that such power should exist in the members of a trading partnership and according to a comparatively early case this power was clearly recognized. (*Lane v. Williams*, 2 Vernon, 292) * * *. At the same time,

the implied power of borrowing money, like every other implied power of a partner, only exists where the business is of such a kind that it cannot be carried on in the usual way without such a power. If money is borrowed by one partner for the declared purpose of increasing the partnership capital (*Fisher v. Taylor*, 2 Hare, 218), or of raising the whole or a part of the capital agreed to be subscribed in order to start the firm (*Green-slade v. Dower*, 7 B. & C. 635), or if the business is such as is customarily carried on on ready money principles, e. g., mining on the cost book principle (*Hawtayne v. Bourne*, 7 M. E. W. 595), or without borrowing, as in the case of solicitors (*Plummer v. Gregory*, 18 Eq. 624), the firm will not be bound unless some actual authority or ratification can be proved.”)

Sec. 430. Authority to Bind Firm on Negotiable Paper.

Case No. 585. *Jefferson Bank v. C. W. L. Co.*

(Set out as Case No. 475, *supra*.)

Question 585: What power has a partner to bind firm on negotiable paper?

Case No. 586. *Dowling v. Exchange Bank*, 145 U. S. 512.

(Set out as Case No. 481, *supra*.)

Question 586: (See questions following case as set out.)

Sec. 431. Authority of Partner to Settle, Release, Receive Payment, etc.

(Note: A partner has authority to receive payment of the firm debts: *Heart v. Walsh*, 75 Ill. 200; unless there has been an agreement to the contrary of which the debtor has notice: *Clark v. Lauman*, 63 Ill. Ap. 132. So he has authority to settle and release: *Salmon v. Davis*, 4 Binney (Penn.) 375, 5 Amer. Dec. 410.)

Sec. 432. Authority to Mortgage and Pledge.

Case No. 587. *Rock v. Collins*, 99 Wis. 630.

WINSLOW, J.: “* * * 2. It is objected that the chattel mortgage upon the logging outfit was invalid,

because made by one partner alone, without the knowledge of his co-partner. The general power of one partner to pay firm debts out of firm property in the ordinary course of business is well established; and, if he may pay a debt, no good reason is perceived why he may not secure its payment by pledging or mortgaging firm property. It has been held by this Court that one partner may, in the absence of his co-partner, mortgage the firm property to secure a bona fide partnership debt (*Hage v. Campbell*, 78 Wis. 573); also, that one partner may make a valid voluntary assignment of the personal property of the firm for the benefit of creditors where the other partner has absconded (*Voshmik v. Urquhart*, 91 Wis. 513). There has been some diversity of opinion upon the question whether one partner may, without the consent of his co-partner who is accessible for consultation, mortgage the entire firm property to secure a firm debt, when the effect of the mortgage would be to practically terminate the business of the firm, although the weight of opinion seems to favor the validity of such a mortgage. *Jones, Chattel Mortgages*, Sec. 46. But it is certain that the subsequent acquiescence or consent of the other partner would remove all question as to the validity of the mortgage. *Jones, Chattel Mortgages, supra*. Such acquiescence was proven in the present case."

Question 587: Does a partner have power to mortgage the firm property to secure a firm debt? Does he have authority to mortgage the entire property of the firm? Is there a difference of opinion on this question?

Sec. 433. Authority to Use Partnership Assets to Pay or Secure Personal Debts.

Case No. 588. *Blinns v. Waddell*, 32 Gratt. 588.

STAPLES, J.: " * * * One partner cannot pledge or sell the partnership property, in payment of his individual debts, without the consent of his co-partner; and the

title is not divested by such pledge or sale in favor of a separate creditor, even though the latter may not know it was partnership property. * * *

Question 588: A, of the firm of A and B, owes a personal debt to C of \$100. He transfers to C certain partnership property in payment of this debt. Can B recover this property? Suppose C did not know it was partnership property when he received it?

Sec. 434. Authority of Partner to Make Admissions.

(Note: See the cases on agency. A partner may make admissions binding upon the other partners, when made concerning the partnership business.)

Sec. 435. Authority to Receive Notice.

(Note: See the cases on agency. A notice to the partner will bind the other partners when received in reference to partnership business and according to the law of agency.)

CHAPTER EIGHTY

LIABILITY OF PARTNER FOR TORTS OF HIS CO-PARTNER

§ 436. General rule.

§ 437. Examples of liability for the tort of a partner.

Sec. 436. General Rule.

(Note: The subject is governed by the general rules of agency. See cases on that subject. Also the following cases).

Sec. 437. Examples of Liability for Tort of Partner.

Case No. 589. Wolf v. Mills, 56 Ill. 360.

Facts: See the opinion.

Point Involved: Whether one partner is liable to third persons for the deceit of the other partner in the sale of goods for the firm.

MR. JUSTICE THORNTON: "The appellee brought an action on the case, alleging that appellants sold him a lot of sheep pelts, having on them a large quantity of wool; and, with intent to defraud him, delivered other and inferior pelts in quality, and deficient in the quantity of wool. Appellee recovered a verdict.

"Wolf and Haber jointly owned the pelts at the time of the sale. The proof is satisfactory that the pelts sold averaged about five pounds of wool per pelt; and the pelts delivered, only three pounds.

"As to the alleged fraud the evidence is conflicting. One witness testifies positively, that he saw young Haber, a son of appellant, change the pelts, and that he placed light in place of the heavy pelts, soon after the sale. This was contradicted by the son; but the weight of evidence has been determined by a jury, and we shall not disturb the finding, unless some principle of law has been violated.

"Appellants urge that, as there is no evidence to prove the change, if made, was by the direction of Wolf, or by any person in his employment or under his control, therefore he is not liable. The evidence does show that Wolf & Haber were partners in the buying and selling of the sheep pelts, and that young Haber was handling them and throwing them from one pile to the other. The jury were justified in the inference that this was in the scope of the partnership business, as it was connected with the joint property. It is improbable that the son would be thus engaged, unless directed. The father must have given him some instructions in regard to the exchange.

"There was then, no error in the following instruction given for appellee: 'If the jury believe, from the evidence, that the defendants sold the plaintiff a certain lot of sheep pelts at an agreed price and that plaintiff has paid such price, and that the defendants afterward, either in person, by their agents, servants, or employees delivered to plaintiff a lot of sheep pelts in any respect different from and inferior to those actually sold, intending thereby to have the plaintiff believe they were the same he had purchased, and intending to deceive and defraud the plaintiff, then the jury are instructed to find defendants guilty, and to assess as damages whatever loss the evidence may show the plaintiff sustained through such fraud and deceit.'

"A tortious act of one partner will often create a liability against the firm. So a fraud, committed by one partner, in the course of the partnership business, binds the firm, even though the other partners have no knowledge of, or participation in, the fraud.

“The jury might reasonably infer all that was necessary to fix the liability of the firm.

“The judgment must be affirmed.”

Question 589: State the facts, the question presented and the Court's decision in this case.

Case No. 590. Hess v. Lowrey, 122 Ind. 225.

Facts: Lowrey sues Luther W. Hess and Frank C. Hess, as co-partners, for damages caused by malpractice. The alleged malpractice was committed by one of the partners (who is now deceased) and it is sought to hold the other liable.

Point Involved:

MITCHELL, C. J.: “* * * That each partner is the agent of the firm while engaged in the prosecution of the partnership business, and that the firm is liable for the torts of each, if committed within the scope of his agency, appears to be well settled. Champlin v. Laytin, 18 Wend. 407, 31 Am. Dec. 382; Tucker v. Cole, 54 Wis. 539, 11 N. W. Rep. 703; Fletcher v. Ingram, 46 Wis. 191; Taylor v. Jones, 42 N. H. 25; Schwabacker v. Riddle, 84 Ill. 517; Story Partn. §§ 107-166; 1 Bates, Partn. § 461. ‘It follows from the principles of agency, coupled with the doctrine that each partner is the agent of the firm, for the purpose of carrying on its business in the usual way, that an ordinary partnership is liable in damages for the negligence of any one of its members in conducting the business of the partnership.’ 1 Lindl. Partn. 299. Thus, in Hyrne v. Erwin, 23 S. C. 226, 55 Am. Rep. 15, which was an action against two physicians for an injury resulting from the negligent and unskillful setting of a broken arm, it was held that the act of one within the scope of the partnership business was the act of each and all, as fully as if each was present, participating in all that was done, and that each partner guaranties that the one in charge shall display reasonable care, diligence, and skill, and that the failure of one is the failure of all.”

Question 590: (1.) What was the tort for which defendant was sought to be held in this case? Did the Court hold him liable?

(2.) Defendants were partners in owning and operating a coal mine. One of the defendants was manager of the mine and it was under his personal superintendence. He allowed it to get into an unsafe condition whereby an employee was injured. Can the other defendant be held? (*Mellors v. Shaw*, 1 B. & S. 437.)

Case No. 591. *Lathrop v. Adams*, 133 Mass. 471.

Facts: Suit against defendants as co-partners of a newspaper for publishing a libelous article concerning plaintiff.

Point Involved: Whether one of the partners was chargeable with this libel published without his knowledge by the other partner.

FIELD, J.: “* * * But it has been established on much consideration, as one of the general principles of the law of agency, that the principal is liable civilly in damages for the torts of his agent done for his benefit in the prosecution of his business, and within the scope of the agent’s employment, and this rule has been extended to wilful trespasses, fraudulent misrepresentations, malicious prosecutions and libels. * * *

“The logical difficulty of imputing the actual malice or fraud of an agent to his principal is perhaps less when the principal is a person than when it is a corporation; still the foundation of the imputation is not that it is inferred that the principal actually participated in the malice or fraud, but, the act having been done for his benefit by his agent acting within the scope of his employment in his business, it is just he should be held responsible for it in damages.

“As partners are the general agents of each other and of the firm, within the scope of the business of the partnership, we think a test of the question we are considering is the liability of the proprietor of a newspaper

in damages for a libel maliciously published without his knowledge by his agent, whom he has trusted with the management of his newspaper, and this we regard as well settled. *Shepherd v. Whitaker*, L. R. 10 C. P. 502; *Dunn v. Hall*, 1 Ind. 344; *Andres v. Wells*, 7 Johns. 260; *Perret v. New Orleans Times Newspaper*, 25 La. An. 170; *Storey v. Wallace*, 60 Ill. 51. * * *

Question 591: What was the tort in this case committed by the one partner for which the other was held liable?

(2.) What was the nature and scope of the firm business? Do you think the Court would have been less likely to have held the partner liable for the tort of libel had the business been of a mercantile nature? Why?

Case No. 592. *Rosenkrans v. Barker*, 115 Ill. 331.

Facts: Suit brought by Barker against Rosenkrans and Weber to recover damages for an alleged malicious prosecution and false imprisonment. In 1882, Barker resided in Iowa and was engaged in the jewelry business. In the latter part of 1882 he bought a bill of goods of Rosenkrans and Weber. When the bill was due \$100 was paid, but the rest (\$250) has never been paid. Rosenkrans was then a resident of Milwaukee, Wisconsin, but he was in partnership with Weber in Chicago. Weber induced Barker to come to Chicago and caused his arrest and detention for 10 or 12 hours. Rosenkrans did not hear of this until long after until the case was on appeal when he at once told his partner he was wrong and that the appeal should not be prosecuted, and his advice was followed and the appeal dropped.

Point Involved: Whether one partner is liable for the wrongful arrest of a debtor to the firm, caused by the other.

CRAIG, J.: “* * *

“It is, however, claimed by appellee that Rosenkrans is liable upon either one of two grounds: *First*, because those who caused the arrest were servants or agents of Rosenkrans, acting within the scope of their agency;

second, the wrongful proceeding was instituted for Rosenkrans, and in his name, and when he became aware of what had been done he ratified it. Weber, who caused the arrest of Barker, was not in fact a partner of Rosenkrans, but he acted for his wife, who was the partner, and, so far as the acts are concerned, they may be regarded as the acts of Rosenkrans' partner. In many respects one partner is the agent of the other. In the purchase and sale of goods within the scope of the partnership business the acts of one may be regarded as the acts of both. In such cases the one that transacts the business acts for himself and in the capacity as agent of the other, and in that capacity he binds himself and also binds his partner. By entering into partnership each party reposes confidence in the other, and constitutes him his general agent as to all partnership concerns. Gow, Partn. 52. But the question involved here is not as to the liability of one partner for the contracts of the other, but it is whether one partner may be liable in damages for the wrongs of the other. Mr. Collyer, in his work on Partnership, § 457, says: 'A learned writer observes that though partners are in general bound by the contracts, they are not answerable for the wrongs, of each other. In general, acts or omissions in the course of the partnership trade, or business, in violation of law, will only implicate those who are guilty of them.' And, in 1 Lindl. Partn. bk. 2, c. 1, § 4, the author says: 'As a rule, however, the *willful* tort of one partner is not imputable to the firm. For example, if one partner *maliciously* prosecutes a person for stealing partnership property, the firm is not answerable unless all the members are in fact privy to the malicious prosecution.'

"In *Gilbert v. Emmons*, 42 Ill. 143, where a question arose as to the liability of one partner for the act of the other in causing the arrest of a person charged with larceny of money belonging to the firm, it was held that the mere knowledge and consent of one partner that the other should have the person accused arrested would not render the partner so knowing and consenting liable to

an action for malicious prosecution; it was necessary that the consent should be of such a character as to amount to advice and co-operation. In *Grund v. Van Vleck*, 69 Ill. 478, a question arose as to the liability of one partner for the tort of the other, and it was held that one partner cannot involve another in a trespass unless in the ordinary course of their business, and in a case where the trespass is in the nature of a taking which is available to the partnership; and in such case, to render the partner liable who did not join in the commission of the trespass, he must afterwards have concurred and received the benefit of it. Here no part of the debt was collected by the commencement or prosecution of the proceedings against Barker, and it is not claimed that a liability exists on account of receiving any benefit from the arrest; and if Rosenkrans is to be held liable, it is upon the ground that he was a member of the firm which instituted the suit and caused the arrest. This under the authorities cited, cannot be done [and there was no ratification].”

Question 592: What was the tort in this case? What was the nature of the business? Was the other partner held liable?

(Note: This case while probably sound on the facts, is wrong in its statement of the law. Whether a partner is liable on the torts of his co-partner does not depend on whether the tort is *wilful* or not, but whether or not it is within the scope of the partnership.)

CHAPTER EIGHTY-ONE

THE DURATION OF THE LIABILITY

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| § 438. Liability of incoming partner
for past indebtedness. | for debts created after his
retirement. |
| § 439. Liability of outgoing partner | § 440. Liability of secret partners. |

Sec. 438. Liability of Incoming Partner for Past Indebtedness.

Case No. 593. Karraker v. Eddleman, 101 Ill. Ap. 23.

MR. JUSTICE CREIGHTON: “* * *

“A firm or copartnership as constituted after an incoming partner has become a member thereof cannot in any case be held for the payment of a previously contracted debt for which such incoming member has not in some way become bound, and it is the clearly and universally established doctrine, that a new partner, coming into an existing firm, will not be liable in respect to debts contracted by the firm previous to his entering it, unless he assumes them, and the same rule applies where one becomes a partner with another in business already established. * * * The presumption always is that such incoming partner does not assume the payment of previously contracted debts ‘but such presumption may be rebutted by satisfactory proof of the contrary intention and agreement’ * * * All the Illinois authorities proceed upon the theory that to hold such partner for such debt there must have been on his part a promise, agreement or intention to assume the debt, but we regard

it as well established that such promise, agreement or intention may be proved by circumstantial evidence, i. e., may be inferred by proof of such facts and circumstances as clearly warrant such inference. * * *

Question 593: (1.) Is an incoming partner liable for past indebtedness by his mere act of coming into the firm?

(2.) May creditors hold him as a member of the firm where he assumes such debts in his agreement with the other partners?

(3.) As such incoming partner was not in the firm when the debt was created, why do you think that this assumption of indebtedness should give the past creditors any right against him?

(4.) How may this assumption of indebtedness be inferred?

Sec. 439. Liability of Outgoing Partner for Debts Created After His Withdrawal.

Case No. 594. Austin v. Holland, 69 N. Y. 571.

Facts: Suit on a promissory note dated August 1, 1869, signed in the firm name of Dillon, Beebe & Co. Holland is sought to be held as a member of such firm. He denies that he was at that time a member of the firm. Loveland received the note for services rendered by him after Holland withdrew. A notice of dissolution was published in the Toledo papers where the firm carried on business, and a copy was mailed to Holland at Detroit. He testified he never received it.

Point Involved: Of the notice necessary to be given by a retiring partner to safeguard against future indebtedness incurred by the other partner or partners; of the distinction to be taken as to those who have dealt with the firm and others; whether mailing a notice which is never received by a customer is notice to him; whether one who has been employed by the firm is entitled to the notice required for customers.

ANDREWS, J.: “* * *

“The publication of notice of the dissolution of a partnership in a newspaper at the place where the busi-

ness was carried on is notice to all persons who had not had prior dealings with the firm; and, if thereafter one of the partners enters into a contract in the firm name with a new customer or dealer, the other partners will not be bound. The rule is different in respect to persons who have dealt with the firm before the dissolution. The rule in such cases in this state requires that, to relieve a retiring partner from subsequent transactions in the partnership name, notice of the dissolution must be brought home to the person giving credit to the partnership. If, in any way, by actual notice served, or by seeing the publication of the dissolution, or by information derived from third persons, the party, at the time of the dealing, is made aware of the fact that the partnership has been dissolved, the contract will not bind the firm. It is sufficient to exempt the firm from liability that the person so contracting with a partner in the firm name knew or had reason to believe that the partnership had been dissolved, but this must appear and be found by the jury, or else the contract will be treated as the contract of the partnership: *Ketcham v. Clark*, 6 Johns. (N. Y.) 144; 5 Am. Dec. 197; *Graves v. Merry*, 6 Cow. (N. Y.) 701; 16 Am. Dec. 471; *Vernon v. Manhattan Co.*, 17 Wend. (N. Y.) 524; 22 Id. 183; *Nat. Bk. v. Norton*, 1 Hill (N. Y.), 572; *Coddington v. Hunt*, 6 Id. 595; *Clapp v. Rogers*, 12 N. Y. 287; *City Bank v. McChesney*, 20 Id. 242; *Bank of Commonwealth v. Mudgett*, 44 Id. 514; *Van Eps v. Dillage*, 6 Barb. (N. Y.) 244; *Mechanics' Bank v. Livingston*, 33 Id. 458. In *Vernon v. The Manhattan Co.*, the chancellor says: 'But to exempt the copartners from liability (on a contract with a previous dealer with the firm), the jury must be satisfied that the person with whom the new debt was contracted either had actual notice that the copartnership was dissolved, or that facts had actually come to his knowledge sufficient to create a belief that such was the fact.' The same rule is recognized in the other cases cited, and by elementary writers: 3 Kent's Com. 607; Story on Part. sec. 161; Coll. on Part. sec. 533; Lindley on Part. 337. Lindley says: 'Those

who have dealt with the firm before a change took place, are entitled to assume, until they have notice to the contrary, that no change has occurred. * * * If notice, in point of fact, can be established, it matters not by what means for it has never been held that any particular formality must be observed.' In this case, the jury have found that the plaintiff did not receive the notice sent by mail, and had no information of the dissolution of the firm of Dillon, Beebe & Co. prior to the transaction in question. The mailing of notice properly directed to the party to be charged raises a presumption of notice in fact, for it is presumed that letters sent by post to a party, at his residence, are received by him in due course. Best on Presumptions, Sec. 403. But this is a presumption of fact, and not of law, and may be repelled by proof; and, if the receipt of the letter in this case was disproved, then the defendant failed to show the actual notice required in order to exempt him from responsibility, and the question whether the letter was received was, we think upon the evidence, for the jury. The learned counsel for the defendant has not referred as to any case which decides that the mailing of a notice of dissolution is in law equivalent to actual notice, and exempts a retiring partner from liability to prior dealers on subsequent engagements in the firm name. Notice by mail of the dishonor of commercial paper is in most cases sufficient by the law merchant to charge an indorser. It is a part of the contract that notice may be given in this way, and it is not material in fixing the liability of the indorser whether he receives it or not.

"But we think the rule requiring actual notice of the dissolution of a partnership to prior dealers is a part of the law of this state, and should not be departed from. It may subject parties in some cases to inconvenience, but the principle upon which the rule proceeds is that, when one of two parties is to sustain injury from the giving of credit, the one who originally induced it should bear the loss, rather than the one who, without notice of the change, relied upon the continued existence of the

partnership: Story on Part. Sec. 160; Wat. on Part. 384. The judgment of the general term should be affirmed.”

Question 594: A, of the firm of A, B and C, retired therefrom. D is a customer. E has never dealt with the firm. What notice must A give D in order to avoid the possibility of being held on future debts? What notice must he give E? Suppose he mails a letter to E which E never gets; is this notice?

(Note: It has been held that in cases of dissolution of the firm by bankruptcy of a member, death of a member, war, notice by the other parties is unnecessary.)

Sec. 440. Liability of Secret Partners.

(The rule just noticed in the previous section does not apply in case of secret partners, because parties dealing with the firm after the withdrawal of the secret partner do not extend credit to the secret partner.)

CHAPTER EIGHTY-TWO

REMEDIES OF PARTNERSHIP CREDITORS IN COURTS OF LAW

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|---|-------------------------------------|
| § 441. Partners jointly liable. | § 445. Right of individual creditor |
| § 442. Each partner liable <i>in solido</i> . | against firm assets. |
| § 443. Rights of firm creditors | § 446. Preference of creditors. |
| against firm assets. | |
| § 444. Right of firm creditor against | |
| individual assets of part- | |
| ner. | |

Sec. 441. Partners Jointly Liable.

Case No. 595. Mason v. Eldred et al., 6 Wall (U. S.) 231.

FIELD, J.: “* * *

“It is true that each copartner is bound for the entire amount due on copartnership contracts; and that this obligation is so far several that if he is sued alone, and does not plead the non-joinder of his copartners, a recovery may be had against him for the whole amount due upon the contract, and a joint judgment against the copartners may be enforced against the property of each. But this is a different thing from the liability which arises from a joint and several contract. There the contract contains distinct engagements, that of each contractor individually, and that of all jointly, and different remedies may be pursued upon each. The contractors may be sued separately on their several engagements or together on their joint undertaking. But in copartner-

ships there is no such several liability of the copartners. The copartnerships are formed for joint purposes. The members undertake joint enterprises, they assume joint risks, and they incur in all cases joint liabilities. In all copartnership transactions this common risk and liability exist. Therefore it is that in suits upon these transactions all the copartners must be brought in, except when there is some ground of personal release from liability, as infancy or a discharge in bankruptcy; and if not brought in, the omission may be pleaded in abatement. The plea in abatement avers that the alleged promises, upon which the action is brought were made jointly with another and not with the defendant alone, a plea which would be without meaning, if the copartnership contract was the several contract of each copartner."

Question 595: (1.) A and B as partners give a note to C (it not being stated therein that they are jointly and severally liable), the note represents a partnership transaction. C sues A on the note. What can A do to abate the action?

(2.) Assuming that C sued A and B and got judgment on the note, could A's property be taken in full satisfaction of the judgment? (See following sections.) In that case could A require B to contribute? (See following sections.)

Sec. 442. Each Partner Liable in Solido.

(Note: Though the partners must all be joined in a suit on a partnership contract debt, yet each partner may be compelled ultimately to bear the entire indebtedness. The debt is a joint one, yet to creditors, each partner stands responsible for the debt *in solido*. Accordingly the creditor can satisfy his judgment out of the assets of any member, leaving the partners to account among themselves. See Sec. 444, *post*.)

Sec. 443. Right of Firm Creditors Against Firm Assets (at Law as Distinguished from in Equity).

(Note: Firm creditors may satisfy judgments against the firm by a levy on the assets of the firm. As to the relative rights

of firm creditors and individual creditors on the assets of the firm where both classes of creditors are before the court of equity or bankruptcy, see next chapter.)

Sec. 444. Right of Firm Creditors Against Individual Assets of Partner (at law as Distinguished from in Equity).

Case No. 596. Stout v. Baker, 32 Kan. 113.

Facts: Stout brings replevin against Baker, a sheriff, to recover a buggy that Baker has seized under a judgment against Stout and Wingert, copartners, and he alleges that such buggy does not belong to Stout and Wingert, but to him, Stout, personally.

Point Involved: Whether under a judgment against partners, sued as partners, the individual property of one of the partners may be taken to satisfy such judgment.

HURD, J.: “* * * We think an execution on it might be legally levied upon the partnership property of both, or the individual property of either. * * *”

Question 596: State the facts, question presented and Court’s decision in this case.

Sec. 445. Right of Individual Creditor Against Firm Assets (at Law as Distinguished from in Equity).

Case No. 597. Newhall et al. v. Buckingham, 14 Ill. 405.

Facts: Newhall and Co. were creditors of Hoyt and to enforce their debt sued out an attachment which was levied upon the stock of goods of the firm of Hoyt and Haskins. The sheriff took possession of the goods. Haskins shortly afterward made an assignment of the firm’s goods to Buckingham and Buckingham brings suit, contending that the goods of the firm were wrongfully seized for the individual debts of a member of the firm.

Point Involved: Whether a partner's interest in the firm is subject to levy on execution; whether the sheriff in selling such interest can take manual possession of firm assets; whether he can seize some or must seize all of the firm assets.

TREAT, C. J.: "It was held in *Bachurst v. Clinkard*, 1 Shower, 173, that on an execution against one of two partners, the sheriff might seize the partnership property, and sell the share of him against whom the writ issued. In *Pope v. Haman*, Comb. 217, Holt, C. J., said: 'Upon a judgment against one copartner, the sheriff may take the goods of both in execution; and the other copartner hath no remedy at law, otherwise than by retaking the goods, if he can; for the vendee of the sheriff becomes tenant in common with the other copartner.' In *Heydon v. Heydon*, 1 Salk. 392, on an execution against one partner, which had been levied on the partnership goods, the Court remarked: 'The sheriff must seize all, because the moieties are undivided; for if he seize but a moiety, and sell that, the other will have a right to a moiety of that moiety; but he must seize the whole, and sell a moiety thereof undivided, and the vendee will be tenant in common with the other partner.' In *Parker v. Pistor*, 3 B. & P. 288, an execution against one partner was levied on the partnership goods, and the partnership creditors moved the Court to give the sheriff time to return the writ, until an account could be taken of the claims against the firm; but the Court refused the application on the ground, 'that it was a very plain case at law, and that all the difficulties were to be encountered in equity; that the safest line of conduct for the sheriff to pursue was to put some person in possession of the defendant's share as vendee, leaving him and the parties interested to contest the matter in equity.' In the recent case of *Johnson v. Evans*, 7 M. & G. 240, the Court uses this language: 'It is undoubtedly true, that in order to make, and for the purpose of making, the execution effectual against the share of the debtor

partner in the joint property, the sheriff must seize the whole, the shares of the two partners being undivided. Such seizure of the whole, it is obvious, arises from the necessity of the case; just as if a man purchases an undivided moiety of a chattel that is indivisible, he cannot in any way take possession of that moiety without taking possession of the whole.'

"The English courts uniformly hold, that, on an execution against one partner, the sheriff may seize the partnership goods, and sell the share of the partner against whom the process issued. As respects the property taken, the partnership is dissolved, and the purchaser becomes a tenant in common with the other partner. He, however, acquires the share of the debtor partner subject to the right of the remaining partner, and through him of the partnership creditors, to have the property applied, so far as it may be necessary, to the payment of the joint debts. But this right is an equitable one, and cannot be enforced at law. The weight of authority in the United States is decidedly the same way. * * *

"The cases of *Morrison v. Blodgett*, 8 N. H. 238, 29 Am. Dec. 653, and *Deal v. Bogue*, 20 Pa. St. 228, 57 Am. Dec. 702, deny the right of the sheriff to seize the partnership goods on an execution against one partner. But these cases are clearly against the current of the authorities. They are innovations upon the well-established legal rule; and are the result of attempts by courts of law to administer a principle of equity. They virtually prevent the individual creditors of a partner from subjecting his share in partnership property to the payment of their debts. What remedy have such creditors against the share of their debtor in partnership goods, unless the goods can be seized, and his interest in them sold on execution? In order to sell that interest, the officer must, for the time being, have the custody of the property. A levy would be ineffectual, if the property is to remain in the possession and subject to the control of another. From the necessity of the case, the officer must be allowed to reduce it into possession. The authority to sell a

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chattel or any interest therein on execution, necessarily includes the power to take possession thereof for the purpose. There are, indeed, inconveniences growing out of the seizure of partnership property for the individual debts of a partner. They are, however, unavoidable. They are incidents of this kind of title to property. They must be borne, or separate creditors may be without any effectual remedy for the collection of their debts. Their debtor may have no individual estate, and still be entitled to a large surplus in the joint estate after the affairs of the partnership are adjusted. The same inconveniences may arise in the case of tenants in common of a chattel; and yet the law is firmly settled, that on an execution against one of them, the sheriff may take exclusive possession of the chattel in order to sell a moiety thereof. *Melville v. Brown*, 15 Mass. 82; *Reed v. Howard*, 2 Mete. 36; *Waddell v. Cook*, 2 Hill, 47; *Blevins v. Baker*, 11 Iredell, 291. It is said in *Douglass v. Winslow*, *supra*, 'It may be inconvenient to other partners to have their operations thus broken in upon, and partnerships virtually dissolved; but it is a hazard to which they are necessarily subjected, when they unite in business with others incumbered with separate debts. Were the law otherwise, a wide door would be open to delay and defraud creditors. A man with funds to a very large amount, half of which is due to others, has nothing to do but to invest them in a partnership, and he may then set his creditors at defiance, or oblige them to wait until the partnership concerns are liquidated and closed by the slow process of a court of chancery.' * * *

"In equity, a partner has the specific right to have the partnership effects faithfully applied to the payment of the partnership debts. The real interest of a partner in the joint property, is a moiety of the surplus that may remain after the joint debts are discharged. And this interest is all that a purchaser acquires at a sale on execution. He succeeds only to the rights of the debtor partner. He takes the property burdened with the pay-

ment of the joint debts. The sheriff delivers the property to the purchaser and the other partner as tenants in common, subject to the incumbrance of a partnership account. The account may be taken at the instance of the purchaser or the other partner. Although there is not a perfect agreement among the decided cases, the better opinion seems to be, that a court of equity may interfere by injunction to restrain a sale by the sheriff, until the partnership account is taken, and the precise interest of the debtor partner ascertained. 1 Story's Eq. § 678; Story on Partnership, § 264; Place v. Sweetzer, 16 Ohio, 142; Cammack v. Johnson, 2 N. J. Eq. 163.

"This case is at law, and must therefore be decided upon legal principles. Under our statute, whatever is the subject matter of seizure and sale on execution, may be taken in the proceeding by attachment, and held subject to sale on the judgment that may be recovered. The sheriff had a clear right to seize the goods in question; and he has equally the right to retain them until the suit is determined. If it results in a judgment for attaching creditors, he may sell the interest of Hoyt in the goods, and deliver them to the purchaser and the assignee as tenants in common, subject to the rights of the assignee and of the creditors of the firm to have them applied, so far as it may be necessary, to the satisfaction of the joint debts. But these rights are to be asserted in equity. A bill for the purpose may be filed by the purchaser, the assignee, or any of the joint creditors.

"The circuit court erred in holding, that the assignee was entitled to withdraw the goods from the custody of the sheriff."

Question 597: According to this case, if an individual creditor has a judgment against one who is in partnership with a third person, can the partnership property be seized under execution?

(2.) Must *all* the partnership property be seized?

(3.) What is sold under such seizure? How would such interest be determined?

Sec. 446. Preference of Creditors.

(A partnership has the same right to prefer creditors as an individual has. In equity where the assets are before the Court for distribution of course there is to be no preference. But when the assets are not before such a court, the partners may prefer in payment such creditors as they choose. Under our present bankruptcy act such preferences would indeed be acts of bankruptcy and recoverable from the preferred creditors, provided bankruptcy proceedings are begun within four months of the preference.)

CHAPTER EIGHTY-THREE

RIGHTS OF CREDITORS OF PARTNERS IN COURTS OF EQUITY TO FIRM AND INDIVIDUAL ASSETS

§ 447. The rule in equity.

§ 448. The partner as a creditor.

Sec. 447. The Rule in Equity and Bankruptcy as to the Division of the Firm Assets.

Case No. 598. National Bankruptcy Act (1898) Sec. 5 f.

“The net proceeds of the partnership property shall be appropriated to the payment of the partnership debts, and the net proceeds of the individual estate of each partner to the payment of his individual debts. Should any surplus remain of the property of any partner after paying his individual debts, such surplus shall be added to the partnership assets and be applied to the payment of the partnership debts. Should any surplus of the partnership property remain after paying the partnership debts, such surplus shall be added to the assets of the individual partners in the proportion of their respective interests in the partnership.”

Question 598: How are firm and individual assets marshalled in bankruptcy for payment of firm and individual debts?

Case No. 599. *Rodgers v. Meranda*, 7 Ohio St. 180.

BARTLEY, C. J.: “Two questions are presented for determination in this case. 1. The first is, whether in

the distribution of the assets of insolvent partners, where there are both individual and partnership assets, the individual creditors of a partner are entitled to be first paid out of the individual effects of their debtor, before the partnership creditors are entitled to any distribution therefrom. It is well settled that, in the distribution of the assets of insolvent partners, the partnership creditors are entitled to a priority in the partnership effects; so that the partnership debts must be settled before any division of the partnership funds can be made among the individual creditors of the several partners. This is incident to the nature of partnership property. It is a right of a partner to have the partnership property applied to the purposes of the firm; and the separate interest of each partner in the partnership property is his share of the surplus after the payment of the partnership debts. And this rule, which gives the partnership creditors a preference in the partnership effects, would seem to produce, in equity, a corresponding and correlative rule, giving a preference to the individual creditors of a partner in his separate property; so that partnership creditors can, in equity, only look to the surplus of the separate property of a partner, after the payment of his individual debts; and, on the other hand, the individual creditors of a partner can, in like manner, only claim distribution from the debtor's interest in the surplus of the joint fund, after the satisfaction of the partnership creditors. The correctness of this rule, however, has been much controverted; and there has not been always a perfect concurrence in the reasons assigned for it by those courts which have adhered to it. By some, it has been said to be an arbitrary rule, established from considerations of convenience; by others, that it rests on the basis that a primary liability attaches to the fund on which the credit was given—that in contracts with a partnership, credit is given on the supposed responsibility of the firm; while in contracts with a partner as an individual, reliance is supposed to be placed on his separate responsibility; 3 Kent Com. 65.

And again, others have assigned as a reason for the rule that the joint estate is supposed to be benefited to the extent of every credit which is given to the firm, and that the separate estate is, in like manner presumed to be enlarged by the debts contracted by the individual partner; and there is consequently a clear equity in confining the creditors, as to preferences, to each estate respectively, which has been thus benefited by their transactions; *McCulloh v. Dashiell*, 1 Harr. & Gill. (Md.) 96, 18 Am. Dec. 271. But these reasons are not entirely satisfactory. So important a rule must have a better foundation to stand upon than mere considerations of convenience; and practically it is undeniable that those who give credit to a partnership look to the individual responsibility of the partners, as well as that of the firm; and also, those who contract with a partner in his separate capacity, place reliance on his various resources or means, whether individual or joint. And inasmuch as individual debts are often contracted to raise means which are put into the business of a partnership, and also partnership effects often withdrawn from the firm and appropriated to the separate use of the partners, it cannot be practically true that the separate estate has been benefited to the extent of every credit given to each individual partner, nor that the joint estate has been retained from the separate estate of each partner the benefit of every credit given to the firm. Unsatisfactory reasons may weaken confidence in a rule which is well founded.

“What then is the true foundation of the rule which gives the individual creditor a preference over the partnership creditor, in the distribution of the separate estate of a partner? To say that it is a rule of general equity, as has been sometimes said, is not a satisfactory solution of the difficulty; for the very question is, whether it be a rule of equity or not. In the distribution of the assets of insolvents, equality is equity; and to say that the rule which gives the individual creditor a preference over the partnership creditor in the separate estate of a

partner is a rule of equality, does not still rid the subject of difficulty. For leaving the rule to stand, which gives the preference to the joint creditors in the partnership property, and perfect equality between the joint and individual creditors, is, perhaps, rarely attainable. That it is, however, more equal and just as a general rule, than any others which can be devised, consistently with the preference to the partnership creditors in the joint estate, cannot be successfully controverted. It originated as a consequence of the rule of priority of partnership creditors in the joint estate, and for the purposes of justice became necessary as a correlative rule. With what semblance of equity could one class of creditors, in preference to the rest, be exclusively entitled to the partnership fund, and, concurrently with the rest, entitled to the separate estate of each partner? The joint creditors are no more meritorious than the separate creditors; and it frequently happens, that the separate debts are contracted to raise means to carry on the partnership business. Independent of this rule, the joint creditors have, as a general thing, a great advantage over the separate creditors. Besides being exclusively entitled to the partnership fund, they take their distributive share in the surplus of the separate estate of each of the several partners, after the payment of the separate creditors of each. It is a rule of equity, that where one creditor is in a situation to have two or more distinct securities or funds to rely on, the Court will not allow him, neglecting his other funds, to attach himself to one of the funds, to the prejudice of those who have a claim upon that, and no other to depend upon. And besides the advantage which the joint creditors have, arising from the fact that the partnership fund is usually much the largest, as men in trade, in a great majority of cases, embark their all, or the chief part of their property, in it; and besides their distributive rights in the surplus of the separate estate of the other partners, the joint creditors have a degree of security for their debts and facilities for recovering them, which the separate creditors

have not; they can sell both the joint and the separate estate on an execution, while the separate creditor can sell only the separate property and the interest in the joint effects that may remain to the partners, after the accounts of the debts and effects of the firm are taken as between the firm and its creditors, and also as between the partners themselves. With all these advantages in favor of partnership creditors, it would be grossly inequitable to allow them the exclusive benefit of the joint fund, and then a concurrent right with individual creditors to an equal distribution in the separate estate of each partner. What equality and justice is there in allowing partnership creditors, who have been paid eighty per cent. on their debts out of the joint fund, to come in *pari passu* with the individual creditors of one of the partners, whose separate property will not pay twenty per cent. to his separate creditors? How could that be said to be an equal distribution of the assets of insolvents among their creditors? It is true that an occasional case may arise where the joint effects are proportionably less than the separate assets of an insolvent partner. But, as a general thing, a very decided advantage is given to the partnership creditors, notwithstanding this preference of the individual creditors in the separate property. And that advantage, arising out of the nature of a partnership contract, is unavoidable. Some general rule is necessary; and that must rest on the basis of the unalterable preference of the partnership creditors in the joint effects, and their further right to some claim in the separate property of each of the several partners. The preference, therefore, of the individual creditors of a partner in the distribution of his separate estate, results as a principle of equity from the preference of partnership creditors in the partnership funds, and their advantages in having different funds to resort to, while the individual creditors have but the one.

* * *,,

Question 599: Where the assets of the partnership and of the partners are before the court of equity for distribution among

creditors, what according to this case, are the rights of firm creditors and of individual creditors?

(Note: The rule of this case is the one adopted in the majority of American states. In some, however, the rule is applied that after the partnership assets have been exhausted by dividends to the partnership creditors, the creditors may prove up and participate with the individual creditors in the individual assets.)

Case No. 600. Pahlman v. Graves, 26 Ill. 405.

BREESE, J.: “* * *

“The general rule by which courts of equity are governed, in the administration of the assets of deceased and insolvent partners, is, if there be partnership property, and also separate property of a partner, the partnership debts are to be paid out of the proceeds of the joint estate, and the individual debts are to be paid out of the proceeds of the separate estate. The joint and individual debts are to be kept distinct, and the assets derived from the two estates are to be marshalled accordingly. The joint creditors have no claim on the fund arising from the separate estate, until the individual debts are satisfied, and on the other hand the separate creditors can only seek payment out of the surplus of the partnership effects, after the satisfaction of the joint liabilities. Such is unquestionably the rule in equity where there is a joint and separate estate to be distributed among joint and individual creditors. 1 Story Eq. Jur. Sec. 675; 3 Kent's Com. 64; Story on Part., Sec. 363; Wilder v. Keeler, 3 Paige, 167; McCulloh v. Dashiell, 1 Harris & Gill, 96.

“If, however, * * * there is no joint fund to which the joint creditors can resort and no solvent partner from whom payment can be enforced, they should be allowed to participate equally, with the private creditors in the estate of the deceased [or insolvent] partner.”

Question 600: If there is no joint estate and no solvent partner, what rights have the creditors, according to this case, in equity, in the individual assets as against individual creditors?

Case No. 601. Case v. Beauregard, 99 U. S. 119.

MR. JUSTICE STRONG: “* * *

“No doubt the effects of a partnership belong to it as long as it continues in existence, and not to the individuals who compose it. The right of each partner extends only to a share of what may remain after the payment of the debts of the firm and the settlement of its accounts. Growing out of this right, or rather included in it, is the right to have the partnership property applied to the payment of the partnership debts in preference to those of any individual partner. This is an equity the partners have as between themselves, and in certain circumstances it inures to the benefit of the creditors of the firm. The latter are said to have a privilege or preference, sometimes loosely denominated a lien, to have the debts due to them paid out of the assets of a firm in course of liquidation, to the exclusion of the creditors of its several members. Their equity, however, is a derivative one. It is not held or enforceable in their own right. It is practically a subrogation to the equity of the individual partner, to be made effective only through him. Hence, if he is not in a condition to enforce it, the creditors of the firm cannot be. *Rice v. Barnard*, 20 Vt. 479, 50 Am. Dec. 54. *Appeal of the York County Bank*, 32 Pa. St. 446. But so long as the equity of the partner remains in him, so long as he retains an interest in the firm assets, as a partner, a court of equity will allow the creditors of the firm to avail themselves of his equity, and enforce, through it, the application of those assets primarily to payment of the debts due them, whenever the property comes under its administration.

“* * * [The Court here states that certain assignments have been made, etc., whereby the partnership assets, before the filing of the suit, ceased to be such.]

“The effect of these transfers and act of fusion was very clearly to convert the partnership property into property held in severalty, or, at least, to terminate the equity of any partner to require the application thereof to the payment of the joint debts. Hence if, as we have seen, the equity of the partnership creditors can be worked out only through the equity of the partners, there was no such equity of the partners, or any one of them, as is now claimed, in 1869, when this bill was filed. No one of the partners could then insist that the property should be applied first to the satisfaction of the joint debts, for his interest in the partnership and its assets had ceased. * * * Unless therefore, the conveyances of the partners in this case and the act of fusion were fraudulent, the bank of which the complainant is receiver has no claims upon the property now held by the New Orleans and Carrollton Railroad Company, arising out of the facts that it is a creditor of the partnership, and was such a creditor when the property belonged to the firm.”

Question 601: In what way may the right of the partnership creditor subject the partnership assets to the payment of his debt be lost?

Sec. 448. Partner as Creditor.

(Note: If a partner is a creditor of the partnership, he cannot prove up his debt in competition with other creditors. This rule is stated in a leading English case as follows: “The rule is, that a partner in a firm, against which a commission of bankruptcy issues, shall not prove in competition with the creditors of the firm, who are in fact his own creditors; shall not take part of the funds to the prejudice of those who are not only creditors of the partnership, but of himself.” *Ex parte Sillitoe*, Glyn & Jameson’s Reports, on page 382.)

PART XXIV

DISSOLUTION OF THE PARTNERSHIP

Chapter Eighty-four.	Dissolution by What Acts.
Chapter Eighty-five.	Dissolution by Lapse of Time, Agreement and Transfer of Partner's Interest.
Chapter Eighty-six.	Dissolution by Death of Partner.
Chapter Eighty-seven.	Dissolution by Bankruptcy and Court Decree.
Chapter Eighty-eight.	Liquidation and Accounting on Dissolution.

CHAPTER EIGHTY-FOUR

DISSOLUTION BY WHAT ACTS

Sec. 449. How Partnerships May be Dissolved.

(Note: Partnerships may be dissolved:

1. By act of the parties:
 - (1.) By lapse of time and accomplishment of object.
 - (2.) By mutual agreement of the partners.
 - (3.) By a transfer by a partner of his interest.
2. By act of law:
 - (1.) Death of the partner.
 - (2.) Bankruptcy of the partner.
3. By judicial decree:
 - (1.) On account of internal dissensions.
 - (2.) On account of partner's incapacity.
 - (3.) On account of partner's misconduct.
 - (4.) On account of financial failure of the enterprise.)

CHAPTER EIGHTY-FIVE

DISSOLUTION BY LAPSE OF TIME, AGREEMENT AND TRANSFER OF PARTNER'S INTEREST

§ 450. Dissolution by lapse of time. § 452. Dissolution by transfer of
§ 451. Dissolution by mutual agree- partner's interest.
ment.

Sec. 450. Dissolution by Lapse of Time.

Case No. 602. Howell v. Harvey, 5 Ark. 270.

Point Involved: Whether a party in a partnership at will is entitled to withdraw without notice.

LACY, J.: "In the present case the partnership was to continue during the pleasure of the contracting parties. It is therefore strictly a partnership at will, and subject to the rules that govern such agreement. Chancellor Kent says, that it is an established principle of the law of partnership, that if it be without any definite period, any party may withdraw at a minute's notice when he pleases and dissolve the partnership. The existence of engagements with third persons will not prevent the dissolution, though their engagements will not be affected by the act. He admits that cases may occur where reasonable notice might be advantageous, but he holds it not to be requisite, and he adds that a party may, in a case free from fraud, choose an unreasonable time for the dissolution. The exception he makes in a case of fraud, indicates to our minds that the rule is not

so unbending or universal, as it is laid down, unless the limitation is intended to include those cases where the renunciation is made in good faith and at a proper time. As a general principle, contracts subsisting during pleasure, are naturally and necessarily dissolvable by the mere exercise of the will of either of the parties; and this is the principle according to the civil law under ordinary circumstances, and to such an extent is it carried that a positive stipulation against the dissolution at the will of either of the parties will be held utterly void, as inconsistent with the true nature and intent of such relation. In cases of equity, we think the true rule to be this, that to enable one partner to dissolve at will the partnership, two things must occur; first, the renunciation of the partnership must be in good faith, and secondly, it must not be made at an unreasonable time.

* * *

Question 602: Where a partnership may be dissolved at will, what notice must either party desiring to withdraw give the other?

Sec. 451. Dissolution by Mutual Agreement

(Note: No matter for what term, or whether for any definite term, a partnership may, of course, be dissolved by mutual agreement.)

Sec. 452. By Transfer of Partner's Interest.

(Note: As was noted at the beginning of this subject, a partnership is conducted on a purely personal basis, and therefore any transfer of a partner's interest without the consent of the other partners works a dissolution. See also the next case.)

CHAPTER EIGHTY-SIX

DISSOLUTION BY DEATH OF PARTNER

- | | |
|--|-------------------------------------|
| § 453. Death of partner dissolves
firm. | real estate on death of
partner. |
| § 454. Title of surviving partner. | § 456. Rights of creditors. |
| § 455. Devolution of partnership | |

Sec. 453. Death of Partner Dissolves Firm.

Case No. 603. Andrews v. Stinson, 254 Ill. 111.

MR. JUSTICE CARTER: “* * *

“The principal point discussed in the briefs is whether the two contracts executed by said executors and the surviving partners, Hand and Stinson (in connection with the authority granted in Andrews’ will), constituted a continuation of the old or the creation of a new partnership. The death of either partner is, *ipso facto*, from the time of the death a dissolution of the partnership. (Remick v. Emig, 42 Ill. 343; Nelson v. Hayner, 66 id. 487; Douthart v. Logan, 190 id. 243.) And this is the general rule in other jurisdictions. (22 Am. & Eng. Ency. of Law,—2d ed.—199, and cases cited; 30 Cyc. 620, and cases cited.) It is sometimes said that a stipulation in the articles of partnership providing for its continuation after the death of the partner is binding upon the heirs or representatives of the deceased partner. Such agreements may be binding upon the surviving partners (22 Am. & Eng. Ency. of Law,—2d ed.—202), but it is at the option of the representatives, and if they do not

consent, the death of the party puts an end to the partnership. (3 Kent's Com.—14th ed.—57, and note; Buckingham v. Morrison, 136 Ill. 437.) The surviving partners, on the dissolution of the firm by the death of one of the members, are charged with the duty of proceeding at once to settle up the partnership estate. They become trustees as to the deceased partner's interest, and while there is a community of interest between themselves and the representatives of the deceased partner in the adjustment of the partnership affairs, the partnership, for that purpose, only has a limited continuance. (Nelson v. Hayner, *supra*; Douthart v. Logan, *supra*.) If they continue business they do it at their own peril. They have no lawful right to expend the money of the firm in new enterprises, however necessary the expenditure may be to the conduct of the business. (Remick v. Emig, *supra*.) While a surviving partner in mercantile business may make small purchases of material to render the stock more salable, he has no power to make large purchases intended to continue the business. (Oliver v. Forrester, 96 Ill. 315.) The surviving partners, under the law, are required to wind up and close out the business, and, after paying the firm debts, to distribute the assets among the surviving partners and the representatives of the deceased partner. 1 Woerner's Am. Law of Administration, (2d ed.) Sec. 124; 22 Am. & Eng. Ency. of Law, (2d ed.) 200; 30 Cyc. 636.

“Where there are provisions in the articles of agreement or will for the continuance of the business after the death of one of the partners, it is sometimes inaccurately said that the death of the partner does not dissolve the partnership. If the business is carried on after death of the partner under such arrangement or by the agreement of the heirs or personal representatives of the deceased, there is, in effect and in law, a new partnership, of which the survivors and the executors or heirs are the members, the new members becoming liable, as the old, to the creditors of the firm. (22 Am. & Eng. Ency. of Law,—2d ed.—201, and cases cited; 1 Woer-

ner's Am. Law of Administration,—2d ed.—Sec. 123; Exchange Bank v. Tracy, 77 Mo. 594; McGrath v. Cowen, 57 Ohio St. 385; Madison v. Farnham, 44 Minn. 95; Jones & Cunningham's Pr.—2d ed.—82; Parsons on Partnership,—3d ed.—*439. See also, 1 Bates on Partnership, Sec. 52; Owens v. Mackall, 33 Md. 382.) A reference to the authorities will disclose that while the above rule of law is not followed in some jurisdictions, the weight of authority, as well as sound reason, is in accord therewith. Under this reasoning it must be held that the agreements entered into by the executors and surviving partners created a new partnership.”

Question 603: What was the principal point in this case? What did the Court decide respecting it? What effect does death have on a partnership? If the partnership articles provide that death shall not affect the firm, does this bind the executor or administrator? What is the duty of the surviving partners?

Sec. 454. Title of Surviving Partner in Assets and His Duties in Connection Therewith.

Case No. 604. Preston v. Fitch, 137 N. Y. 41.

PECKHAM, J.: “* * *

“It has been settled for many years that upon the death of one partner the survivor becomes the legal owner of the assets and has the exclusive right to sell and dispose of them for the purpose of winding up the partnership affairs, and the survivor does not take such assets in the character of a trustee, but as a survivor holding the legal title. This was decided lately in the case of Williams v. Whedon (109 N. Y. 333), and it has been the acknowledged law for a long number of years. But although the surviving partner thus takes the legal title to the partnership assets, it is yet plain that they come to him impressed with a certain kind of a trust founded upon his duty to dispose of or realize upon such assets and therefrom to pay the debts of the late firm

and to pay over the share of any balance that may then remain and which may belong to the estate of such deceased partner. In occupying this position it has been said by some judges that the surviving partner is not a trustee for the representatives of the estate of the deceased partner and does not bear any fiduciary relations to them. This, however, is more a question of exact accuracy of expression, than of difference of opinion as to the real duties which a surviving partner owes to the representatives of the estate of the deceased partner.

“It is admitted by all that certain rights are conferred upon the representatives of the estate of a deceased partner as against the survivor, and among them is a right to call him to account with reference to his conduct or administration of the assets of the late firm; also a right to compel their application to the payment of the debts of the firm, and to summon him to an accounting and to the payment to them of any balance that may be due the estate.

“Lord Westbury in *Knox v. Gye* (*supra*), while saying that the surviving partner was not a trustee within the strict acceptation of that term, yet admitted that he might be called a trustee so far as his obligations extended to the representatives of the estate of his deceased partner, but that when these obligations had been fulfilled, or discharged, or terminated by law, the supposed trust was at an end. These obligations consist in part at least in the gathering together of the assets of the late firm, realizing upon them, paying the debts of the firm, and, if there be a balance remaining, paying the share due the estate of the deceased partner to the representatives thereof. These are duties, all of which the representatives of the estate of the deceased partner have a plain interest in seeing performed, and while Lord Westbury, in above-cited case from the House of Lords, said the relations were not fiduciary, and Lord Chancellor Hatherly (page 678) thought they were, there was no difference in the opinion that the survivor owed these duties above spoken of.”

Question 604: Upon the death of one partner who gets title to the assets of the firm? What right has the personal representative of the deceased partner?

Sec. 455. Devolution of Partnership Real Estate on Death of Partner.

Case No. 605. Darrow v. Calkins, 154 N. Y. 503.

Point Involved: To what extent real estate owned by the partners as partners will on the death of the partner be converted into personalty for the settlement of the firm affairs. The doctrines of total and partial conversion of partnership real estate.

ANDREWS, C. J.: “* * *

“The legal nature and incidents of land purchased by a copartnership with copartnership funds is a subject upon which great diversity of opinion exists in different jurisdictions. The English rule, after many fluctuations, has, as we understand the cases, come to be that lands so purchased, whether purchased for or used for partnership purposes or not, provided only that they were intended by the partners to constitute a part of the partnership property, become *ipso facto*, in the view of a court of equity, converted into personalty for all purposes, as well for the purpose of the adjustment of the partnership debts and the claims of the partners *inter se* as for the purpose of determining the succession as between the personal representatives of a deceased partner and the heir at law. Darby v. Darby, 3 Drew. 495; Essex v. Essex, 20 Beav. 442; Lindl. Partn. (3rd Ed.) 61 *et seq.* This doctrine had its origin in England, and is said to have grown out of the peculiar law of inheritance there, and to remedy the hardship of the rule which excludes all but the eldest child from the inheritance, and of the other rule which exempts real estate in the hands of the heir from all but the specialty debts of the ancestor. Fairchild v. Fairchild, 64 N. Y. 471; Shearer v. Shearer,

98 Mass. 114. * * * The general doctrine of 'out and out' conversion adopted by the English courts has not been followed to its full extent in this and many other American states. There is no policy growing out of our laws of inheritance or the exemption of lands from liability for simple contract debts, which requires the application of such a doctrine here. The lands of the ancestor are assets for the payments of all debts, and the persons who take by descent and under the statute of distribution are substantially the same. The necessity for an absolute conversion, supposed to be found in the nature of a partnership interest, seems hardly sufficient to justify a fiction which should deprive real estate of a partnership of its descendible quality, when it is admitted on all hands that partnership real estate, if the necessity arises, is first subject to be appropriated in equity to the discharge of partnership obligations and the adjustment of the equities between the parties.

"The clear current of the American decision supports the rule that, in the absence of any agreement, express or implied, between the partners to the contrary, partnership real estate retains its character as realty with all the incidents that species of property possesses between the partners themselves, and also between a surviving partner and the real and personal representatives of a deceased partner, except that each share is impressed with a trust implied by law in favor of the other partner that, so far as is necessary, it shall be first applied to the adjustment of the partnership obligations and the payment of any balance found to be due from the one partner to the other on winding up the partnership affairs. To the extent necessary for these purposes the character of the property is, in equity, deemed to be changed into personalty. On the death of either partner, where the title is vested in both, the share of the land standing in the name of the deceased partner descends as real estate to his heirs, subject to the equity of the surviving partner to have it appropriated to accomplish the trust to which it was primarily subjected. The working out of the

mutual rights which grew out of the partnership relation does not seem to require that the character of the property should be changed until the occasion arises for a conversion, and then only to the extent required. The American rule commends itself for its simplicity. It makes the legal title subservient in equity to the original trust. It disturbs it no further than is necessary for this purpose. The portion of the land not required for partnership equities retains its character as realty, and it leaves the laws of inheritance and descent to their ordinary operation. It would be useless to review in detail the authorities which seem to us to maintain what has been called the 'American Rule.' We refer to a very few of them. *Buchanan v. Sumner*, 2 Barb. Ch. 167; *Collumb v. Read*, 24 N. Y. 505; *Fairchild v. Fairchild*, *supra*; *Shearer v. Shearer*, *supra*; *Shanks v. Klein*, 104 U. S. 18. If, as sometimes happens, the title to partnership real estate is in the name of one of the partners only, on the death of the other partner, his equitable title descends to his heirs or goes to his devisees but subject to the primary claims growing out of the partnership relation. *Fairchild v. Fairchild*, *supra*; *T. Pars. Partn.* No. 272. But the general principles to which we have adverted are those applied in courts of equity in determining the character and incidents of partnership real estate, in the absence of any agreement, express or implied, between the partners on the subject."

Question 605: On the death of a partner, does the partnership real estate standing in his name, go to his heirs or is it to be regarded wholly as partnership property?

Sec. 456. Rights of Creditors of Firm as Against Surviving Partner and Estate of Deceased Partner.

Case No. 606. *Henry v. Caruthers*, 196 Ill. 136.

MR. JUSTICE BOGGS: " * * * At the common law a demand against a co-partnership was regarded as a joint

debt, and after the death of one of the co-partners the right of action at law was against the surviving partner or partners. Equity, however, afforded a remedy against the estate of the deceased partner in the event of the insolvency of the surviving partner or partners. The common law rule was subsequently modified, and the rule established in equity that all partnership debts should be deemed joint and several, and that a right of action existed at law against the surviving partners, and an election also to proceed in equity against the estate of the deceased partner, whether the survivors be insolvent or not. *Mason v. Tiffany*, 45 Ill. 392; *Doggett v. Dill*, 108 id. 560.

(Note: It is the rule in most jurisdictions that the partnership creditors cannot share with the individual creditors of the deceased partner in the division of his estate, until the individual creditors are satisfied, unless there is no living solvent partner and no joint estate.)

CHAPTER EIGHTY-SEVEN

DISSOLUTION BY BANKRUPTCY AND COURT DECREE

§ 457. Dissolution by bankruptcy.

§ 458. Dissolution by court decree.

Sec. 457. Dissolution by Bankruptcy.

(Note: Bankruptcy dissolves the firm. See Sec. 447 as to right of creditors.)

Sec. 458. Dissolution by Court Decree Upon Application of Partner Against the Other.

Case No. 607. New v. Wright, 44 Miss. 202.

Facts: Bill by a partner to dissolve a partnership formed for a stated term of five years, on account of misconduct of partner.

Point Involved: Will a court at the suit of one partner decree a dissolution of the firm where it is shown that the other partner is guilty of misconduct of a serious character appertaining to partnership affairs.

PEYTON, C. J.: “* * * The remaining question for our decision is, did the Court err in overruling the motion for the appointment of a receiver? ‘It must be admitted,’ said the master of the rolls in *Madgwith v. Wimble*, 6 Beavan, 495, ‘that when an application is made for a receiver in partnership cases, the Court is always placed in a position of very great difficulty. On the one hand, if it grants the motion, the effect of it is to put an

end to the partnership, which one of the parties claims a right to have continued; and on the other hand, if it refuses the motion, it leaves the defendant at liberty to go on with the partnership, at the risk and probably at the great loss and prejudice of the dissenting party. Between these difficulties, it is not very easy to select the course which is best to be taken, but the Court is under the necessity of adopting some mode of proceeding to protect, according to the best view it can take of the matter, the interests of both parties.'

"In order to justify the dissolution of a partnership, on the ground of misconduct, abuse, or ill-faith of one of the parties, it is not sufficient to show that there is a temptation to such misconduct, abuse, or ill-faith, but there must be an unequivocal demonstration, by overt acts or gross departures from duty, that the danger is imminent, or the injury already accomplished: Story on Partnership, 464, § 288. Where a concern of any character or kind, covering a partnership, is broken up by controversial suits, and it is apparent that there can be no agreement between the parties in interest for its continuance, a receiver will be appointed: Williams v. Wilson, 4 Sandf. (N. Y.) Chan. 379; Edwards on Receivers, 330. And a dissolution of a partnership may be granted and a receiver appointed on account of the gross misconduct of one or more of the parties: 1 Story's Eq. 635, § 672a. To authorize the appointment of a receiver there must be some breach of the duty of a partner, or of the contract of partnership: Harding v. Glover, 18 Ves. 281."

Question 607: Why was dissolution and a receiver asked for in this case? When will misconduct of a partner justify dissolution notwithstanding the term has not expired?

(Note: A partnership may be dissolved for misconduct, for financial failure with no relief in sight, and for inability of the partners to work in reasonable harmony.)

CHAPTER EIGHTY-EIGHT

LIQUIDATION AND ACCOUNTING ON DISSOLUTION

Sec. 459. The Share or Liability of Each Partner.

Case No. 608. Shea v. Donahue, 15 Lea (Tenn.) 160.

Facts: Suit for partnership accounting between Shea and Donahue, partners under a written agreement for one year "as merchants in making, buying and selling all kinds of tinware, stoves, pumps, etc." And it provided, "And to constitute a fund for the purpose Timothy Shea has paid in as stock one thousand dollars, which will constitute a common stock, to be used and employed between us in buying goods, wares and merchandise. John Donahue being a practical workman and having considerable experience in the above named business, it is agreed that he will give the business his entire personal attention and the benefit of his experience, to place against the cash furnished by said Shea. We are to bear the expenses and losses jointly and share the profits equally. The capital stock is not to be withdrawn by either party until the end of the term, but to be employed as capital unless otherwise mutually agreed between us in writing." The business was carried on for about three years. On dissolution, Donahue claims to be entitled to one-half of the capital advanced by Shea. The chancellor decided that Donahue is entitled to no part of the capital. He appeals.

Point Involved: Whether one who contributes his

time and skill is entitled on dissolution to a share in the capital paid by the other partner.

COOPER, J.: "The contention of the defendant is, that by the terms of the agreement he was entitled at the end of one year to an equal share of the profits of the business, and to one-half of the capital advanced by his partner, and this, although it goes without saying he would retain all his practical experience which was to be placed against the cash furnished by his partner. But the agreement is that the partners are only to 'share the profits equally,' not the profits and the capital. And the profits of any business are only what remains after deducting debts and expenses, and the capital paid in. Lindley on Partn. 791, 806. The provision that the capital stock shall constitute a common stock to be used in buying the materials and wares of their trade, merely designates the mode in which it is agreed that the capital shall be invested. And the further provision that the capital stock shall not be withdrawn by either party until the end of the term, was only intended to restrain the partners from drawing funds from the business so as to trench upon the capital while the partnership continued. There is nothing in the article of agreement to take the case out of the ordinary one of a partnership in profit and loss upon unequal capitals.

"Of course the articles of a partnership may expressly provide for an equal division of the assets, upon a dissolution, notwithstanding an unequal advance of capital by the respective partners. The same result may follow a continuous course of dealing upon a basis which implies such equal division. For if there is no evidence from which any different conclusion as to what was agreed can be drawn, the shares of all the partners will be adjudged equal, upon the favorite maxim of chancery, that equality is equity. But, as Mr. Lindley tells us, the rule is when the partners have advanced unequal capitals, and have agreed to share profits and losses equally, without more, that each partner is entitled to his advance before divi-

sion, and a deficiency in the capital must be treated like any other loss, and borne equally by the partners. Lindley Partn. 807.

“The only authorities adduced by the learned counsel of the defendant, in support of his contention in this case, are to the effect that property brought into the partnership business by the members of the firm, or bought with capital advanced, becomes partnership property, and may be disposed of as such by one of the partners under his general powers as a member of the firm. And so it does beyond all question, for the very object of contributing capital, either in property or money, is to secure a partnership stock for the purpose of carrying on the common business. But this fact has nothing to do with the settlement between the partners of their accounts at the end of the partnership. ‘By the capital of a partnership,’ says Mr. Lindley, ‘is meant the aggregate of the sums contributed by its members for the purpose of commencing or carrying on the partnership business. The capital of a partnership is not therefore the same as its property; the capital is a sum fixed by the agreements of the partners, whilst the actual assets of the firm vary from day to day, and include everything belonging to the firm and having any money value. Moreover, the capital of each partner is not necessarily the amount due to him from the firm; for not only may he owe the firm money, so that less than his capital is due to him, but the firm may owe him money in addition to his capital, *e. g.*, for money loaned. The amount of each partner’s capital ought therefore always to be accurately stated, in order to avoid disputes upon a final adjustment of accounts; and this is more important where the capitals of the partners are unequal, for if there is no evidence as to the amounts contributed by them, the shares of the whole assets will be treated as equal.’ Lindley Partn. 610. [1 Ewell’s Lindley, 2d Am. Ed. 320.] The same author adds in another place: ‘When it is said that the shares of partners are *prima facie* equal, although their capitals are unequal, what is meant is that the losses of capital,

like other losses, must be shared equally, but it is not meant that on a final settlement of accounts capitals contributed unequally are to be treated as an aggregate fund which ought to be divided between the partners in equal shares.' Lindley, Partn. 67. On the contrary, in his chapter devoted to partnership accounts [2 Lindley, Partn. 2d Am. Ed. 402], he expressly tells us that the assets of a partnership should be applied as follows:

" '1. In paying the debts and liabilities of the firm to non-partners.

" '2. In paying to each partner ratably what is due from the firm to him for advances as distinguished from capital.

" '3. In paying to each partner ratably what is due from the firm to him in respect of capital.

" '4. The ultimate residue, if any, will then be divisible as profit between the partners in equal shares, unless the contrary can be shown.'

"In accordance with these principles, the following decision has been made by the supreme court of New York in a case cited in a note to page 610 of Lindley on Partnership: 'Where by the terms of the agreement the defendant furnished the capital stock, and the plaintiff contributed his skill and services, and the profits of the copartnership were to be equally divided, the plaintiff is not entitled to any part of the capital stock on a settlement of the affairs of the partnership. He has no interest in any part of the capital excepting so far as in the progress of the business the same may have been converted into profits.' *Conroy v. Campbell*, 13 Jones & Sp. 326. The case, it will be noticed, is exactly in point. And to the same effect in principle are *Whitcomb v. Converse*, 119 Mass. 38, 20 Am. Rep. 311, *ante*; *Knight v. Ogden*, 2 Tenn. Ch. 473, and *Shepherd, ex parte*, 3 Tenn. Ch. 189. No case has been found to the contrary.

"Chancellor's decree affirmed."

(Note: See Mechem's Elem. of Partn. §§ 305-308.)

Question 608: (1.) If A contributes capital and B, skill and time, is B entitled to any of the capital on dissolution? Why?

(2.) How are the assets of a partnership to be applied upon a dissolution?

(3.) Suppose in the partnership of A and B above stated, there is a loss of all the capital and a further indebtedness which A pays?

(Note: In Lindley on Partnership, 8th Ed., the author says: "The only case that practically gives rise to difficulty is where partners have advanced, or agreed to advance, unequal capitals, and to share profits and losses equally. If nothing more than this is agreed, a deficiency of capital must be treated like any other loss and the assets remaining after the payment of all debts and advances must be distributed amongst the partners, or some of them, as to put all on an equality. If in such case one partner is insolvent and unable to contribute his share of the loss of capital, the solvent partners are not bound to contribute for him, but each partner is to be treated as liable to contribute an equal share of such loss, and the assets are then to be applied in paying to each partner ratably what is due to him in respect of capital.")

DIVISION F
—
CORPORATIONS

DIVISION F

CORPORATIONS

- Part XXV. Introductory.
Part XXVI. Corporate Capacity and Powers.
Part XXVII. Stock and Stockholders.
Part XXVIII. Directors and Administrative Officers.
Part XXIX. Foreign Corporations.

PART XXV

INTRODUCTORY

CHAPTER EIGHTY-NINE

DEFINITION AND THEORY

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| § 463. Purposes for which corporations may be formed. | |

Sec. 460. Corporations Defined.

Case No. 609. Thomas v. Dakin, 22 Wend. (N. Y.) 9.

Facts: Thomas sues on three bills of exchange as president of an association called The Bank of Central New York, formed under a statute to authorize "the busi-

ness of banking.” Defendant makes a technical defense raising the question whether the bank is a corporation.

Point Involved: The definition and characteristics of a body corporate.

MR. CHIEF JUSTICE NELSON: “* * * Are these associations [formed under the law in question] corporations? In order to determine this question, we must first ascertain the properties essential to constitute a corporate body, and compare them with those conferred upon the associations; for if they exist in common, or substantially correspond, the answer will be in the affirmative. A corporate body is known to the law by the powers and faculties bestowed upon it, expressly or impliedly, by the charter; the use of the term corporation in its creation is of itself unimportant, except as it will imply the possession of these. They may be expressly conferred, and then they denote this legal being as unerringly as if created in general terms. It has been well said by learned expounders, that a corporation aggregate is an artificial body of men, composed of divers individuals, the ligaments of which body are the franchises and liberties bestowed upon it, which bind and unite all into one, and in which consists the whole frame and essence of the corporation. The ‘Franchises and liberties,’ or, in modern language, and as more strictly applicable to private corporations, the powers and faculties, which are usually specified as creating corporate existence, are: 1. The capacity of perpetual succession; 2. The power to sue and be sued, and to grant and receive in its corporate name; 3. To purchase and hold real and personal estate; 4. To have a common seal; and 5. To make by-laws. * * * Any one comprehending the scope and purpose of them, at this day, will not fail to perceive that some of the powers above specified are of trifling importance, while others are wholly unessential. For instance, the power to purchase and hold real estate is no otherwise essential than to afford a place of business; and the right to use a common seal, or to make

by-laws, may be dispensed with altogether. For as to the one, it is now well settled that corporations may contract by resolution, or through agents, without seal; and as to the other, the power is unnecessary, in all cases where the charter sufficiently provides for the government of the body. The distinguishing feature, far above all others, is the capacity conferred, by which a perpetual succession of different persons shall be regarded in the law as one and the same body and may at all times act in fulfillment of the objects of the association as a single individual. In this way, a legal existence, a body corporate, an artificial being, is constituted; the creation of which enables any number of persons to be concerned in accomplishing a particular object, as one man. While the aggregate means and influence of all are wielded in affecting it, the operation is conducted with the simplicity and individuality of a natural person. In this consists the essence and great value of these institutions. Hence it is apparent that the only properties that can be regarded strictly as essential, are those which are indispensable to mould the different persons into this artificial being, and thereby enable it to act in the way above stated. When once constituted, this legal being created, the powers and faculties that may be conferred are various—limited or enlarged, at the discretion of the legislature, and will depend upon the nature and object of the institution, which is as competent as a natural person to receive and enjoy them. We may, in short, conclude by saying, with the most approved authorities at this day, that the essence of a corporation consists in a capacity: 1. To have a perpetual succession under a special name, and in an artificial form; 2. To take and grant property, contract obligations, sue and be sued by its corporate name as an individual; and 3. To receive and enjoy in common, grants of privileges and immunities.

“We will now endeavor to ascertain with exactness the powers and attributes conferred upon these associations by virtue of the statute. * * *

“1. Upon a perusal of these provisions, it will appear

that the association acquires the power to raise and hold for common use any given amount of capital stock for banking purposes, which, when subscribed, is made personal property, and the several shares transferable the same and with like effect as in case of corporate stock; to assume a common name under which to manage all the affairs of the association; to choose all officers and agents that may be necessary for the purpose, and remove and appoint them at pleasure. It will hence be seen, that although the association may be composed of a number of different persons, holding an interest in the capital stock, its operations are so arranged that they do not appear in conducting its affairs; all are so *bound* together, so moulded into one, as to constitute but a single body, represented by a common name, or names (the knot of the combination), and in which all the business of the institution is conducted by common agents. In this way it purchases and holds real and personal property, contracts obligations, discounts bills, notes, and other evidences of debt, receives deposits, buys gold and silver bullion, bills of exchange, etc., loans money, sues and is sued, etc.

“This artificial being possesses the powers of perpetual succession. Neither sale of shares, nor death of shareholders affect it; if one should sell his interest, or die, the purchaser or representative, by operation of law, immediately takes his place. Sec. 19. Nor can the insanity of a member work a dissolution. *Id.* Officers and agents for conducting the business of the association are secured. In case of vacancy, by death or otherwise, the place may at once be filled. Sec. 18. For the entire duration, therefore, of the association, and which may be without limit, Sec. 16, Sub. 5, the whole body of shareholders, though perpetually shifting, constitute the same uniform, artificial being which is to be engaged through the instrumentality of officers and agents in conducting the business of the concern, and no member is personally liable. Sec. 23. Then, as to the powers conferred, without again specially recurring to them, it will be seen at

once that the associations possess all that are deemed essential, according to the most approved authorities, to constitute a corporate body. They have a capacity: 1. To have perpetual succession under a common name and in an artificial form; 2. To take and grant property, contract obligations, to sue and be sued by its corporate name, in the same manner as an individual; 3. To receive grants of privileges and immunities, and to enjoy them in common. All these are expressly granted, and many more, besides the general sweeping clause, 'to exercise such incidental powers as shall be necessary to carry on such business' (meaning the business of banking), under which even the seal and right to make by-laws are clearly embraced, if essential, in conducting the affairs of the institution."

Question 609: (1.) How does this opinion define a corporation?

(2.) What are the inherent powers of corporations?

(3.) Did the Court decide that the company under consideration was a corporation?

(Note: Of course it is unusual for any corporate officer to sue or be sued in its behalf. Almost universally the corporation must sue and be sued in its own name as an individual.)

Case No. 610. The Overland Cotton Mill Co. et al. v. The People, 32 Colo. 263.

Facts: Suit to enforce a penal statute providing in substance that any *person* who shall hire and employ a child under fourteen years of age in any mill or factory, shall be guilty of a misdemeanor and punished by fine.

Point Involved: Whether a corporation is a person within a penal statute employing that word.

CHIEF JUSTICE GABBERT: "* * *

"The Overland Cotton Mill Company is a corporation organized under the laws of this state, and it is argued that, because the statute only says that 'any person' who shall employ children under the age of fourteen years in any mill or factory shall be deemed guilty of violating its

provisions, that, therefore, a corporation, in its capacity as such, cannot be reached in a prosecution of this character. In other words, because the statute does not specify corporations, that they are exempted from the statutory provision on the subject of the employment of children under the age of fourteen years. * * *

Prima facie, the word 'person,' in a penal statute which is intended to inhibit an act, means 'person in law;' that is, an artificial, as well as a natural, person, and therefore includes corporations, if they are within the spirit and purpose of the statute. *The Pharmaceutical Assn. v. The London & P. S. A., Limited*, 5 Appeal Cases (Law Reports) 857; 7 Enc. of Law (2 Ed.) 841; 1 Clark & Marshall's Private Corp., Sec. 252; Bishop's Stat. Crimes (3 Ed.) Sec. 212; *Stewart v. The Waterloo Turn Verein*, 71 Iowa, 226.

"Whether corporations are included within the statute, depends largely upon its object. *Pharmaceutical Assn. v. London & P. S. A., Limited*, *supra*. The purpose of the statute, as indicated by its title, was to prohibit the employment of children under fourteen years of age in certain kinds of work. It is common knowledge that the places which, by the statute, children under the age of fourteen years are inhibited from working in, are operated largely by corporations. Whether such places were operated by individuals or corporations could make no difference with respect to the employment, for it would be just as detrimental to the child in one instance as in the other. * * * Corporations, therefore, are clearly within the spirit and purpose of the statute, because its ultimate object was to prevent children under a given age from being employed in specified work.

"That the statute provides for imprisonment if the fine imposed is not paid, is not an objection which a corporation can urge against its enforcement. True, the corporation cannot be imprisoned, but the fine can be collected through the means provided for the collection of money judgments. *Commonwealth v. Pulaski Agr. Assn.*, 92 Ky. 197."

Question 610: (1.) When will a statute referring to "persons" be deemed to refer to corporations?

(2.) When not?

(3.) It was provided by law that the county judge should upon application of persons paying one-third of the taxes on real estate of a certain county, order a vote to be taken to ascertain if the qualified voters desired the removal of the court house. An application was made signed by certain parties paying one-third the taxes, and among the applicants and to make up the requisite amount, certain corporations were included. Should the judge order the vote? *Crawford v. Supervisors*, 87 Va. 110.

Case No. 611. *In re Estate of Speed*, 216 Ill. 23.

Facts: The Illinois Act of 1901, exempts from the inheritance tax of Illinois property devised to the use of religious, educational or charitable corporations. Fannie Speed, deceased, by her will, devised certain real estate in the city of Chicago to the Board of Education of the Kentucky Annual Conference of the Methodist Episcopal Church, a corporation of Kentucky, with power to form an educational fund for the promotion of literature, education and religion in Kentucky. It is sought to subject the devise to the inheritance tax. The estate claims to come within the exemption. The state of Illinois claims that the exemption does not apply to foreign corporations.

Point Involved: Whether a state grant of immunities or privileges can favor a domestic over a foreign corporation without conflict with the provision of the federal constitution: "The citizens of each state shall be entitled to all the privileges and immunities of the citizens of the several states;" whether a corporation is a citizen within such provision.

MR. JUSTICE BOGGS: " * * * It has frequently been declared to be a well established principle of constitutional law that a corporation is not a citizen within the first clause of Sec. 2, of Article 4, of the Constitution of the United States, which declares the citizens of each

state shall be entitled to all the privileges and immunities of citizens of the several states. * * * A corporation is a 'person' within the meaning of the concluding clause of the first section of the 14th amendment, which declares that no state shall deprive any person of life, liberty or property without due process of law or deny to any person within its jurisdiction the equal protection of its laws. * * *

Question 611: (1.) Is a corporation a "citizen" within the provisions of the United States Constitution?

(2.) Is it a "person" within provisions using that word?

Sec. 461. Corporations as Entities.

Case No. 612. Parker v. Bethel Hotel Co., 96 Tenn. 252, 31 L. R. A. 706.

Facts: Lucius Frierson on August 28, 1886, purchased from the other stockholders all the stock of the Bethel Hotel Company, a corporation organized for hotel purposes. Thereafter he used the property as his own, leasing it, collecting the rents, etc. He held the property in this manner for seven years during which there were no stockholders' or directors' meetings and no corporate activity. In January, 1892, he conveyed in his own name by deed of trust all the property of the corporation to one W. J. Webster, as an assignment for the benefit of his personal creditors. He had from time to time borrowed money from various parties giving the shares of stock held by him as security. In his deed of assignment to Webster, he did not provide for these creditors who held corporate stock. These creditors now file a bill in equity to annul the trust deed to Webster, to decree the dissolution of the hotel company, to sell its property and distribute the proceeds among the various holders of its stock. Frierson claims that the corporation was dissolved by the sale to him of all of the stock and that he had an equitable title to all of its property by reason of becoming the sole owner of its stock.

Point Involved: Whether a stockholder in a corporation owning all of its stock thereby becomes the owner of all its property and can convey the same in his own name. Generally of the distinction between a corporation and its stockholders.

BRADFORD, J.: (After discussing the facts and holding that the corporation had never been dissolved) “* * *

“Defendants insist that the alleged equitable estate of Lucius Frierson in the property of the Bethel Hotel Company did not depend alone upon the dissolution of the corporation, but resulted also from the fact that he was the sole owner of all its capital stock. The proposition is that, if one person owns all of the shares of stock of a corporation which owes no debts, he, in virtue of such ownership, becomes the equitable owner of all its property, or at least may sell and dispose of it by deed, if he chooses to do so. This proposition is argued by counsel for defendants with force and ability, and is supported by some authority. It has found favor with the supreme court of Maryland, *Swift & Smith*, 65 Md. 428, 433, 57 Am. Rep. 336. But the decision of that learned Court is opposed by the current of authority, and seems to us to overlook and ignore certain principles that are fundamental. A corporation and its shareholders, are distinct legal entities. In *Keith v. Clark*, 4 Lea, 718, this Court held that notwithstanding the state owned all of the stock in the Bank of Tennessee, ‘the bank and the state are entirely different legal entities;’ and in *Lillard v. Porter*, 2 Head. 177, it was said: ‘Stockholders are totally distinct from the corporation.’ Important consequences result from this rule. The shareholders are neither responsible for the debts, nor the torts of the corporation. In the absence of special circumstances, the shareholders cannot be parties, either plaintiffs or defendants, in actions respecting corporate rights, nor have they any title or interest in the property of the corporation. ‘Shareholders,’ says Thompson, ‘are not joint tenants, or in any other sense co-owners of the cor-

porate property, either before or after its dissolution. The title to it rests exclusively in the legal entity called the corporation. A share of the capital stock merely gives the right to partake according to the amount put into the fund, of the surplus profits of the corporation, and ultimately on the dissolution of it, of so much of the fund thus created as remains unimpaired, and is not liable for debts of the corporation.' 1 Thomp. Corp. 1071. As the shareholders have no direct interest in the corporate property, they cannot convey the real estate of the corporation, though all join in the deed. In *Wheelock v. Moulton*, 15 Vt. 519, Redfield, J., stated the reasons for the rule in his usual clear and accurate style. * * * And in *Humphreys v. McKissock*, 140 U. S. 304, 35 L. ed. 473, Mr. Justice Field, discussing the same question, said: 'The property of a corporation is not subject to the control of individual members, whether acting separately or jointly. They can neither encumber nor transfer that property, or authorize others to do so. The corporation—the artificial being created—holds the property, and alone can mortgage or transfer it; and the corporation acts through its officers, subject to the conditions prescribed by law.' A very instructive case on this question is *Baldwin v. Canfield*, 26 Minn. 43. The facts of that case were very similar to those of this case and the direct questions now under consideration were passed upon. The opinion of the Court was in accord with the cases above quoted."

Question 612: (1.) How did the question in this case come to be raised?

(2.) Are the shareholders of a corporation liable for its debts? For its torts?

(3.) If a corporation owes a debt and is sued, are its stockholders necessary or proper parties to the suit? If it sues on a debt owing to it, can or must its stockholders join in the suit?

(4.) Are the shareholders joint owners of the corporate property?

(5.) State the form in which a deed of the property of the corporation should be made and signed.

(6.) The A company is a public service corporation and has the right of eminent domain. All of its stock is held by the B company, a manufacturing company, not having such right. The A company seeks to condemn M's land for its proper corporate purposes, M defends on the ground that as the B company owns all the stock, the proceedings are really by the B company. Is this defense good? (Assume for the purposes of this question that such ownership of stock is legal.)

Case No. 613. Peoples Pleasure Park Co. Inc. and others, v. Rohleder, 109 Va. 439.

Facts: Suit to set aside a deed to the Peoples Pleasure Park Co., Inc., averring that the said corporation is composed exclusively of negroes, and setting up as grounds therefor that the land was subject to a restriction in former deeds as follows: "The title to this land never to rest in a person or persons of African descent."

CARDWELL, J.: " * * *

"Aside from the question, whether or not appellee could obtain the relief she asks against appellants—that is, an annulment of the conveyance to appellant, Peoples Pleasure Park Co., Inc.—on the ground that the restriction on the right of alienation of any of the Fulton Park land to 'a person or persons of African descent' or 'colored person' had been violated by a sale of a part of the land to said appellant, the bill fails to allege facts showing a violation of the restriction, and should have been dismissed upon the demurrers thereto. Such a conveyance, by no rule of construction, vests the title to the property conveyed in 'a person or persons of African descent.' * * *

"In Green's Brice, *Ultra Vires* (2nd Am. Ed.), § 1, 2, it is said, that 'a corporation is a person which exists in contemplation of law only, and not physically.'

"The same author, in commenting on Kyd's definition, says: 'But sufficient stress is not laid upon that which is its real characteristic in the eye of the law, viz., its existence separate and distinct from the individual or individuals composing it. * * * This is the one

important fact. The members of a corporation aggregate, and the one individual who is constituted a corporation sole, may, from their connection with such, have rights and privileges, and be under obligations and duties, over and above those affecting them in their private capacity; but they get them by reflection, as it were, from the corporation. They individually are not the corporation—cannot exercise the corporate powers, enforce the corporate rights, or be responsible for the corporate acts.”

Question 613: Did the owner of this land violate the restriction in the deed? Why?

(Note: All restrictions on the use of real estate are construed strictly, and will not be extended by implication.)

Case No. 614. Russell v. Temple, 3 Davis Abridg. 108.

Facts: Thomas Russell died leaving surviving his widow and several heirs at law. By the Massachusetts law, the widow had a dower interest in the real estate of the deceased, which was an estate for life in one-third thereof, and an absolute ownership in one-third of his personal property, the other two-thirds going to the heirs. Russell had shares in a corporation which principally owned real estate. It was contended on the part of the widow that she should take absolutely one-third of the shares as personal property, and on the part of the heirs that she had but a dower interest (or life estate) therein.

Point Involved: Whether the shares are personal property regardless of the nature of the property owned by the corporation.

“* * *

“For the heirs it was urged that these shares were real estate, because it was said that the estates were real in the corporations; annexed to the soil; and that if these

estates in the corporation were real, the estate of the individual members in them followed their nature, and were real; and that the frequent declarations of the legislature declaring such shares personal estate, at least show a doubt: that when one has a right to receive rent, he has only a right to receive a sum of money; yet it does not follow that his estate is not real estate, out of which his rent issues.

“The judgment of the Court was, that these shares were personal estate, and distribution was ordered accordingly. The principal reason of the decision appears to be, because the Court considered that the individual member, or shareholder, had only a right of action for a sum of money, his part of the net profits or dividends. And so the law has been held to be since this decision was made.”

Question 611: State the contest in this case and what the Court decided.

Case No. 615. State, ex. rel. Watson v. Standard Oil Co., 49 Ohio St. 137.

Facts: Suit by the state of Ohio, upon the information of Watson, its attorney general, to oust the Standard Oil Company of its right to be a corporation in the state of Ohio, on the ground that it had abused its corporate franchises by becoming a party to agreements against public policy, namely, certain agreements constituting it a “trust.” Defendant answered: “That said agreements were agreements of individuals in their individual capacity and with reference to their individual property, and were not nor were they designed to be corporate agreements, and defendant denies that said agreements have illegally affected it in its corporate capacity or that defendant has permitted its corporate powers, business and property to be exercised, conducted, and controlled in an illegal manner.” The individuals named in the trust agreement were the chief owners of the stock of the Standard Oil Company, owning the greater part of its stock.

MINSHALL, J.: "Three questions arise upon the pleadings: 1. Should the defendant, The Standard Oil Company, be regarded as a party in its corporate capacity, to the agreement constituting the Standard Oil Trust. 2. Had the company power to become a party to such an agreement. 3. If so, is the right of the state to demand a forfeiture of its corporate franchises, or of the power to make and perform such agreements, barred by lapse of time.

"1. It will be observed, on reading the answer, that while the defendant denies that it 'entered into or become a party to either or both of the agreements in said petition set forth,' and also, 'denies that it has at any time or in any manner acquiesced in, or observed, performed or carried out either or both of said agreements,' it does not deny the averment of the petition, that 'all of the owners and holders of its capital stock, including all the officers and directors of said company, signed said agreements.' Nor could it have been the intention to do so, as the answer proceeds to admit, 'that it,' the corporation, 'is informed and believes that the individuals named in the agreement, being the same individuals who executed' it, 'did enter into the agreements set forth' in the petition; claiming 'that said agreements were agreements of individuals in their capacity and with reference to their individual property, and were not, nor were they designed to be, corporate agreements.' The claim is based upon the argument, that the corporation is a legal entity separate from its stockholders, that in it are vested all the property and powers of the company, and can only be affected by such acts and agreements as are done or executed on its behalf by its corporate agencies acting within the legitimate scope of their powers. That its stockholders are not the corporation, that their shares are their individual property, and that they may each and all dispose of, and make such agreements affecting their shares, as best suit their private interests; and that no such acts and agreements of stockholders, subservient of their private interests, can be ascribed to the company as

a separate entity, though done and concurred in by each and all of its stockholders.

“The general proposition that a corporation is to be regarded as a legal entity, existing separate and apart from the natural persons composing it, is not disputed; but that the statement is a mere fiction, existing only in idea, is well understood, and not controverted by any one who pretends to accurate knowledge on the subject. It has been introduced for the convenience of the company in making contracts, in acquiring property for corporate purposes, in suing and being sued, and to preserve the limited liability of the stockholders, by distinguishing between the corporate debts and property of the company, and of the stockholders in their capacity as individuals. All fictions of law have been introduced for the purpose of convenience and to subserve the ends of justice. It is in this sense that the maxim in *fictione juris subsistit aequitas*, is used, and the doctrine of fictions applied. But when they are urged to an intent and purpose not within the reason and policy of the fiction they have always been disregarded by the courts. Broom’s Legal Maxims, 130. ‘It is a certain rule,’ says Lord Mansfield, C. J., ‘that a fiction of law shall never be contradicted so as to defeat the end for which it was invented, but for every other purpose it may be contradicted.’ Johnson v. Smith, 2 Burr. 962. ‘They were invented,’ says Brinkerhoff, J., in Wood v. Ferguson, 7 Ohio St. 291, ‘for the advancement of justice, and will be applied for no other purpose.’ And it is in this sense that they have been constantly understood and applied in this state. Hood v. Brown, 2 Ohio R. 269; Rossman v. McFarland, 9 Ohio St. 381; Collard’s Adm’r v. Donaldson, 17 Ohio R. 266.

“No reason is perceived why the principles applicable to fictions in general, should not apply to the fiction that a corporation is a personal entity, separate from the natural persons who compose it, and for whose benefit it has been invented. * * *

“Now, so long as a proper use is made of the fiction,

that a corporation is an entity apart from its shareholders, it is harmless, and, because convenient, should not be called in question; but where it is urged to an end subversive of its policy, or such is the issue, the fiction must be ignored, and the question determined, whether the act in question, though done by shareholders, that is to say, by the persons united in one body, was done simply as individuals and with respect to their individual interests as shareholders, or was done ostensibly as such, but, as a matter of fact, to control the corporation and affect the transaction of its business, in the same manner as if the act had been clothed with all the formalities of a corporate act. This must be so, because the stockholders having a dual capacity, and capable of acting in either, and a possible interest to conceal their character when acting in their corporate capacity, the absence of the formal evidence of the character of the act, cannot preclude judicial inquiry on the subject. If it were otherwise then, in one department of the law, fraud would enjoy an immunity awarded to it in no other.

“Therefore, the real question we are now to determine is, whether it appears from the face of the pleadings, giving effect to all the denials of fact contained in the answer, that the execution of the agreement set forth in the petition, should be imputed to the association of persons constituting The Standard Oil Company of Ohio, acting in their corporate capacity.”

[The rest of the opinion, being very lengthy, is omitted. The Court decided that the Standard Oil Company was a party to the trust agreements, and entered an order “ousting the defendant from the right to make the agreement set forth in the petition and of the power to perform the same.”]

Question 615: If the fiction of corporate entity is made use of in order to perpetrate a fraud on the law will it be ignored? Why?

Case No. 616. Moore & Handley Hardware Co. v. Towers Hardware Co., 87 Ala. 206.

Facts: Bill in equity, filed by the Towers Hardware Co. against the Moore & Handley Hardware Co. for an injunction restraining the second named corporation from selling "plow stocks and plow blades" in violation of a contract made between the Towers Hardware Co. and a partnership composed of J. D. Moore, B. F. Moore and William A. Handley, who, as the bill alleged afterwards formed the defendant corporation. The bill made no showing of fraud. Defendant denies that it is in any way responsible for the agreements or obligations of said partnership.

McCLELLAN, J.: " * * *

"There is a class of contracts, however, which are entered into between the promoters or prospectors of a contemplated corporation and third persons, on the faith of the corporation, intended to inure to its benefit, and which in point of fact do inure to its benefit, on which the corporation will be charged, even in the absence of an express promise to perform, or ratification on the part of the company after it is in *esse*; on 'the familiar principle, that one who accepts the benefit of a contract, which another volunteers to perform in his name, and on his behalf, is bound to take the burden with the benefit.'

"And in those cases where 'associates combine together to create a paper corporation, to cover a partnership or joint venture, and where the stockholders are partners in intention,' and have resorted to the fiction of separate corporate entity to free themselves from individual obligations which had attached to them, with respect to the business they propose to carry on, prior to the organization of the company, courts of equity, when the ends of justice require it, will disregard and look beyond the fiction of corporate entity, and hold the corporation to a discharge of the liabilities resting on its members; and this may be done, although some of the shareholders had not originally incurred the obligation sought to be enforced, provided they had notice of it before entering the corporation, and participated in the

effort to avoid it. *Davis Imp. Wrought Iron W. W. Co. v. Davis Wrought Iron W. Co.*, 20 Fed. Rep. 700; *Beal v. Chase*, 31 Mich. 490, 395, 532.

“The contract of Moore, Moore & Handley, sought to be enforced against the Moore & Handley Hardware Company was not an undertaking between promoters of the company and third parties, nor made on the faith of the corporation, nor intended to inure to its benefit, nor did it inure, in point of fact, to the benefit of the corporation. It is not of that class of contracts which courts enforce against corporations, on the ground that they were made in the corporate name by anticipation, and that the corporation received and accepted the benefits resulting from them.

“There is no allegation of fraud made against the corporation, or its shareholders, and the implication of the fraudulent effect of the corporate action complained of is denied. It is not shown that this is a mere ‘paper corporation,’ to cover a joint venture, in which the corporators are partners in intention, and have resorted to this form for the purpose of evading and avoiding obligations which they have taken upon themselves as individuals, or for the purpose of evading the promise relied on here. If these things had appeared in the case, we should not hesitate to hold the corporation answerable for the individual obligation. But, in the absence of fraud, ‘no authorities have gone the length of holding that any contract made with individuals, exclusively upon individual credit, will become the contract of any future corporation that may be formed for the more convenient management and use of the benefits of it.’ *L. R. & Ft. S. R. Co. Cases*, *supra*.

“If the case of *Beal v. Chase*, *supra*, goes beyond this doctrine, we can not indorse it. We do not think it does. In that case, the corporation had been formed for the purpose of violating a contract not to engage in a certain business. All the corporators were held to have participated in this purpose. The business was to be conducted by the corporation, in connection with the

promisor in his individual capacity. He had an interest in it, both individually and as the principal shareholder of the company; and the Court enjoined the corporation, not generally, but from carrying on the business with or for the individual contracting party. To put the case at bar in line with that case, it would have to appear, not only that the corporators organized for the purpose, and with the intention of evading their contract, through the separate entity of corporate existence, but also that they reserved an interest in the business distinct from their interests as stockholders. None of these facts are shown. The effect of allowing the injunction in this case to continue, would necessarily be to hold all future shareholders in the corporation to the performance of a contract which neither they nor the corporation had ever entered into, and of which they may not even have had notice. Such a result could only be justified on the ground of bad faith in the creation of the company. To thus hamper a bona fide corporation, would be inequitable, and have the effect of establishing a doctrine fraught with much danger to corporate rights, powers and property. * * *

Question 616: (1.) If A in selling his business to B, agrees with B that he will not compete, and then forms or enters a competing corporation, is he violating his contract?

(2.) What does the Court say would be necessary to put this case in line with the case of *Beal v. Chase*?

Sec. 462. Kinds of Corporations.

(Note: Corporations may be classified as follows:

(A.) Public corporations, or those which are founded by the government for public purposes.

(1.) Municipal corporations, as cities and towns.

(2.) Quasi-municipal, as counties, boards of education, park boards, etc.

(B.) Private corporations, or those which are owned by private individuals, even though of a public nature.

(1.) Stock corporations, or those which are organized for purposes of financial profit.

Here we place corporations of a strictly private nature as well as railroads, and all public service corporations having privately owned capital stock.

(2.) Non-stock corporations, or those not organized for private profit.

(a.) Religious corporations.

(b.) Charitable corporations. Lodges, institutes of learning, pleasure clubs, etc.

Question: A partnership must be for financial profit; must a corporation? Is a railroad a private or public corporation?

Sec. 463. Purposes for Which Corporations May Be Formed.

(See the classification in the last section.)

Case No. 617. Re Co-Operative Law Co., 198 N. Y. 479.

Facts: Proceedings, to determine whether the Co-Operative Law Company was legally formed as a corporation to engage in the practice of law.

Point Involved: Whether the practice of law is a legitimate object of incorporation; generally, of the objects for which companies may be incorporated.

VANN, J.: “* * * The practice of law is not a business open to all, but a personal right, limited to a few persons of good moral character, with special qualifications ascertained and certified after a long course of study, both general and professional, and a thorough examination by a state board appointed for that purpose.

“The right to practice law is in the nature of a franchise from the state conferred only for merit. It cannot be assigned or inherited, but must be earned by hard study and good conduct. It is attested by a certificate of the Supreme Court and is protected by registration. No one can practice law unless he has taken an oath of office and has become an officer of the court, subject to its dis-

cipline, liable to punishment for contempt in violating his duties as such and to suspension or removal. It is not a lawful business except for members of the bar who have complied with all the conditions required by statute and the rules of the courts. As these conditions cannot be performed by a corporation, it follows that the practice of law is not a lawful business for a corporation to engage in. As it cannot practice law directly, it cannot indirectly by employing competent lawyers to practice for it, as that would be an evasion which the law will not tolerate. *Quando aliquid prohibetur ex directo, prohibetur et per obliquum.* (Co. Lit. 223.) * * *

"A corporation can neither practice law nor hire lawyers to carry on the business of practicing law for it any more than it can practice medicine or dentistry by hiring doctors or dentists to act for it. (People v. Woodbury Dermatological Institute, 192 N. Y. 454; Hannon v. Siegel-Cooper Co., 167 N. Y. 244, 246.) The legislature in authorizing the formation of corporations to carry on 'any lawful business' did not intend to include the work of the learned professions. * * * Business in its ordinary sense was aimed at, not the business or calling of members of the great professions, which for time out of mind have been given exclusive rights and subjected to peculiar responsibilities. * * *

"These remarks are not intended to cover title guaranty companies, organized under the insurance law and authorized to examine titles, guarantee the correctness of searches and insure against loss by reason of defective titles. (Sec. 170.) The searching of titles is open to all and guaranty companies may employ either lawyers or laymen to transact their business. It is not claimed that they prosecute or defend the rights of others, but only their own, including such as the contract to indemnify gives them."

Question 617: (1.) Can a corporation be organized to practice law? Why?

(2.) Can a corporation be organized to examine titles to real estate and issue guarantee policies, etc.?

(3.) Do you think it is practicing law for a trust company to hire lawyers to draw wills for patrons?

Sec. 464. Generally of the Charter, as a Contract, etc.

Case No. 618. Dartmouth College v. Woodward, 4 Wheat. 518.

Facts: The original charter of Dartmouth College named 12 trustees ("the whole number of said trustees consisting, *and hereafter forever* to consist, of twelve and no more") to constitute a body corporate to be known by the name of The Trustees of Dartmouth College. In 1816, the state of New Hampshire (where said college was situated) passed a law to increase the number of trustees to 21, and to establish a board of 25 overseers, and to make other changes of a material nature in the management of said college. The college or its trustees did not assent to these laws.

Point Involved: Whether the charter is a contract protected by the provision of the federal constitution that no state shall pass any law impairing the obligation of contracts.

CHIEF JUSTICE MARSHALL: " * * * A corporation is an artificial being, invisible, intangible and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly or as essential to its very existence. These are such as are supposed best calculated to effect the object for which it was created. Among the most important are immortality, and if the expression may be allowed, individuality; properties, by which a perpetual succession of many persons are considered as the same and may act as a single individual. They enable a corporation to manage its own affairs and to hold property without the perplexing intricacies, the hazardous and endless necessity, of perpetual conveyances for the purpose of transmitting it from hand to hand. It is chiefly for the purpose of clothing bodies of men, in succession, with these

qualities and capacities, that corporations were invented, and are in use. By these means a perpetual succession of individuals are capable of acting for the promotion of the particular object, like one immortal being. * * *

[Here the Court, in a lengthy opinion, considers the objects of corporations, their public or private nature, the purposes of the present charter, etc.]

“The opinion of the Court, after mature deliberation is, that this is a contract, the obligation of which cannot be impaired, without violating the Constitution of the United States. * * *

“2. We next proceed to the inquiry whether its obligation has been impaired by those acts of the legislature of New Hampshire. * * *”

[The Court concludes that the amendatory acts passed by the New Hampshire legislature impaired the obligations of the charter, and that such acts are therefore unconstitutional and void.]

Question 618: (1.) What prevented the legislature from having the power to pass the law in question?

(2.) How did Chief Justice Marshall define a corporation?

Case No. 619. Avondale Land Co. v. Shook, 170 Ala. 379.

Facts: Suit by minority stockholders to restrain the majority stockholders from amending the charter of the corporation. The exact character of the changes contemplated is not indicated in the opinion, except that they are of a private nature and evidently go to change the objects of the corporation. The constitution of Alabama in force when the original charter was secured provided that all charters were subject to the state's right to alter, amend or repeal, and the present change is sought under a law passed under that provision.

Point Involved: To what extent a charter may be changed by the majority stockholders against the dissent of a minority stockholder, where the state reserves the right to alter, revoke or amend any charter and a law is

enacted, giving the majority stockholders a right to alter the charter.

EVANS, J.: “* * *

“Since the decision of the case of Trustees of Dartmouth College v. Woodward, 4 Wheat, 518, 4 L. Ed. 629, it has been fully recognized in this country that the charter of a private corporation is a contract within the meaning of and under the protection of that clause in the Constitution of the United States which provides that ‘no state shall * * * pass any * * * law impairing the obligations of contracts.’—Section 10, art. 1, Const. U. S. But ‘the charter of a corporation having a capital stock is a contract between three parties, and forms the basis of three distinct contracts. The charter is a contract between the state and the corporation; second, it is a contract between the corporation and the stockholders; third, it is a contract between the stockholders and the state.’—Cook on Corporations (6th Ed.) Sec. 492. The charter is under the protection of said clause of the federal Constitution in all three of its aspects as a contract.

“Such being the case, many, if not all, of the different states of the Union have protected themselves, as far as they thought necessary from the effects of this provision in the federal Constitution by reserving in their constitutions certain powers of altering, revoking, and amending the charters of private corporations thereafter to be organized under the general laws of such states or chartered by special act of the legislatures of such states, so that such reserved power would enter into and form a part of the charter contract. This was done in the constitution of 1875 of this state. The power to amend, alter, or revoke the charter thus being made a part of the charter contract, the exercise of this power by the state in the manner and to the extent contemplated could not be considered as in violation of said Section 10 of Article 1 of the Constitution of the United States. Those who invest their money in such a corpora-

tion do it with full knowledge of the power which the state has reserved to alter, revoke, or amend its charter, and contract with reference thereto. It thus becomes part of the contract. * * * We quote with approval from Cook on Corporations (6th Ed.) Sec. 501, the following: 'The extent of the power of the legislature to amend a charter, where it has reserved that power, is not yet fully settled, and is full of difficulties. There is a strong tendency in the decisions, and a tendency which is deserving of the highest commendation, to limit the power of the legislature to amend a charter under this reserved power. It should be restricted to those amendments only in which the state has a public interest. Any attempt to use this power of amendment for the purpose of authorizing a majority of the stockholders to force upon the minority a material change in the enterprise is contrary to law and the spirit of justice. Under such reserved power the Legislature has only that right to amend the charter which it would have had in case the Dartmouth College Case had decided that the federal Constitution did not apply to corporate charters. In fact, the historical origin of this reservation of the right to amend was due to the effort of the various states of the Union to escape from the decisions in the Dartmouth College Case. By this reserved right the restraint of the federal Constitution is done away with. But the power to make a new contract for the stockholders is not thereby given to the Legislature. The Legislature may repeal the charter, but cannot force a stockholder into a contract against his will.' In the above quotation the author was speaking of such general reservation of power as that contained in the Constitution of Alabama of 1875. We hold that the amendment attempted in this case is a material and fundamental change from the original plan, bringing in new fields of operation and involving greater hazard.

"It follows from the foregoing that the power of amendment in the Constitution of 1875 does not give the Legislature this power to amend the charter of the Avondale Land Company in the manner and to the extent

attempted by the majority stockholders, and therefore no such power could be given by the Legislature to a majority of the stockholders of said corporation; that Section 3462 of the Code of 1907 can confer no greater authority to amend said charter than was reserved by the Constitution of 1875. Hence said Section 3462 cannot confer the authority.

“We are therefore of opinion that it does appear from the averments of the bill of complaint that the attempt of respondents to amend said charter (as set forth in said bill of complaint) was beyond the power of a majority of the stockholders of said corporation when objected to by any stockholder.”

Question 619: (1.) After the decision in the Dartmouth College case, how did the states accomplish the power to change charters thereafter to be issued?

(2.) What sort of changes (as stated by the Court in this case) can be made as against the dissent of minority stockholders, under the state's reserved power to alter and repeal, and under the statutes giving the majority members the right to secure changes of the charter?

(Note: With reference to the right to change the charter against dissenting shareholders, we must keep distinct (a) the right of the state on its own initiative to pass laws amending or abrogating charters, and (b) the right of majority shareholders to apply to the state for and to receive changes in the charter. The general law by which the state reserves its right to amend charters issued after the enactment of such law, gives it the right to pass laws requiring annual reports, to admit stockholders to inspect books, to keep certain sorts of books, to have certain numbers or qualifications of directors, etc. The law by which a certain majority may effect changes in the charter, gives them the right to change the name, the objects, the number of directors, etc. The extent to which the majority can bring about such changes is not entirely clear under the authorities. It would seem, for instance, unjust to allow the majority against dissent of minority stockholders to change the object of a corporation from that of manufacturing automobiles, to that of selling groceries, whether the point is raised as to whether the dissenting stockholder simply cannot object, but may withdraw

from his share ownership, or whether he can be compelled to accept the change. There are decisions (as the one above) which limit the right of alteration very sharply to changes of an immaterial nature or to changes of public importance.)

Sec. 465. Corporations de Facto.

Case No. 620. Harrill v. Davis, 168 Fed. 187.
(Set out as Case No. 565, *supra*.)

Question 620: In this case why was there no corporation *de facto*?

Case No. 621. Imperial Building Co. v. Board of Trade, 238 Ill. 100.

Facts: The law of Illinois forbade incorporation for dealing in real estate. The Imperial Building Company was organized as a real estate company and compliance with the Illinois general corporation law was attempted and the Secretary of State, misinterpreting the law, issued a certificate of incorporation to such company (said certificate being void in law). The company then in good faith proceeded to carry on business as a corporation. It rented certain of its premises to the Chicago Open Board of Trade. Suit was brought against such tenant for rent in arrear. Defendant pleaded "*nul tiel corporation*" (no such corporation). The Imperial Building Company contends that it is at least a corporation *de facto*, and as such its existence as a corporation cannot be questioned by any one except the state.

MR. JUSTICE FARMER: " * * * It is next contended that if appellant's charter be held void it is not subject to be attacked collaterally and that appellee having entered into a contract with appellant for the leasing of the premises is now estopped to deny its corporate existence. The general rule is, that where there is an attempt in good faith to organize under a law authorizing the incorporation, and corporate functions are exercised, this makes the organization a corporation *de facto*, and

its legality cannot be questioned collaterally or by one who deals with it as a corporation. In such cases the introduction in evidence of the charter and proof of user, and that the party seeking to deny the legality of the corporation dealt with it as a corporation, sufficiently proves it a corporation *de facto*, and whether there may have been some irregularities in perfecting the incorporation will not be inquired into. The legality of such incorporation can only be attacked by the state in a direct proceeding. * * *

“The appellee concedes that this is the rule as to *de facto* corporations but contends that there can only be a *de facto* corporation where there is a law under which the corporation might legally be organized, but that if there is no law authorizing the organization of such corporation its non-existence or invalidity can be set up collaterally. Cook on Corporations (Sec. 234) thus defines a corporation *de facto*: ‘The corporation is a *de facto* corporation where there is a law authorizing such a corporation and where the company has made an effort to organize under the law and is transacting business in a corporate name.’ In *American Trust Co. v. Minnesota and Northwestern Railroad Co.*, 157 Ill. 641, it was contended on behalf of certain corporations that had attempted a consolidation without any law authorizing such consolidation, that the validity of the consolidation, when not questioned by the state, must be sustained as against third persons and wrongdoers. The Court held the rule of law was not as broad as contended for, and said (p. 652): ‘Where there is a *de facto* corporation, its corporate existence, except in a few exceptional cases, cannot be questioned collaterally, and can only be inquired into by the state and in a direct proceeding.’ (*Hudson v. Green Hill Seminary*, 113 Ill. 618.) But in order that there should be a *de facto* corporation, two things are essential: First, there must be a law under which the corporation might lawfully be created; and second, user. Where the law authorizes a corporation, and there is an attempt, in good faith, to organize,

and corporate functions are thereupon exercised, there is a corporation *de facto*, the legal existence of which cannot ordinarily be questioned collaterally. * * *

[The Court held that the plea was good and that the rent could not be recovered by the corporation suing as such, as there was not even a corporation *de facto*.]

Question 621: (1.) What three things are essential to the existence of a corporation *de facto*?

(2.) What is a corporation *de jure*?

(3.) If there is a corporation *de facto*, who can question its existence?

(4.) Where the defense is that the corporation is defectively organized, what practical results follow in holding that it has sufficiently complied with the law to constitute a corporation *de facto*?

(5.) What was lacking in the above case which made the defense good that there was not a corporation *de facto*?

(6.) Suppose the Imperial Building Company had been the tenant and its members had been sued personally for the rent, do you think they would have been liable? Could they have asserted that the lease was that of the corporation and not their own?

(7.) A corporation is chartered to carry on a safety deposit vault business, a business for which incorporation may be had under the law. It erects a 16-story building and puts in a small vault in the basement, letting out the rest of the building to tenants for general office purposes. A tenant is sued for the rent. Would you distinguish between such a case and the case above? Why?

Sec. 466. Promoters.

Case No. 622. Yeiser and others v. U. S. Board & Paper Co., 107 Fed. Rep. 340.

Facts: The corporation sues Yeiser and others to annul certain certificates of stock alleged to have been unlawfully obtained by certain parties (Yeiser being the administrator of one of them, now deceased). It appeared that these parties conceived the project of organizing a corporation, obtaining subscriptions thereto and

with the proceeds to purchase a paper mill plant for the company at an advanced price on an option secured by them on the property, thereby realizing a considerable profit. They secured this option at the sum of \$75,000. They then formed a company with a capital stock of \$100,000, subscribing for \$25,000 of the stock, but not paying therefor. Being all the subscribers of the stock, they elected each other directors constituting the whole board. Bell, one of their number, was authorized to secure additional subscriptions. They then voted that the corporation buy the property for \$100,000. A prospectus was then issued and subscriptions of \$45,000 secured. By manipulating matters the defendants secured their \$25,000 of stock, for nothing, and it is the validity of this stock that is questioned as having been secured through fraud on the other stockholders.

SEVERENS, C. J.: "In this country the courts have accepted the essential principle laid down in the English cases, and hold, with scarcely any variation to the doctrine, that the promoter of a company stands in the relation of a trustee to it, and those who become subscribers to its stock, so long as he retains the power of control over it. There is some difference of opinion, as there is in the English cases, in regard to the time when he becomes such promoter, within the meaning and operation of the rule. Some courts are of opinion that he is chargeable with the duties of a trust when he enters into the execution of the scheme which is intended to result in the transfer of the property to a company to be organized and controlled by him. All, however, agree that he comes within the rule when he begins to organize the company, and that from that time he is bound to deal openly and fairly, and in such a way as that those having independent charge of the company, as well as those who are induced to become subscribers to its stock, may be fully advised of the relation he bears to the property which he purposes to sell, in like manner as one who assumes to act as the agent of another in the purchase of property. * * *

“The company, as well as the stockholders, are entitled to the independent judgment of the trustee in regard to the value of the property to be purchased, and the price to be paid, as well as its fitness for the intended use. It is said that the property is worth what the company paid for it, and is adapted to the company’s requirements. It happens so. But this in no manner affects the operation of the rule. * * *

“The substance of the whole matter is that through their breach of trust, they were enabled to get \$25,000 of the company’s stock without paying for it. It seems to us that a decree annulling their title to it is an appropriate remedy. The decree of the circuit court is affirmed.”

Question 622: (1.) State the facts in this case, the question presented and the Court’s decision.

(2.) Why was it immaterial that the company got its money’s worth?

Case No. 623. Lomita L. & W. Co. v. Robinson, 154 Cal. 36.

Facts: See the opinion.

Point Involved: The right of promoters to make a secret profit on the property sold by them to the corporation.

ANGELLOTTI, J.: “* * *

“As to defendants Freeman and Cline, the case, under the authorities, is, of course, a clear one so far as the \$6,500 profit made by Freeman and shared by him in part with the others is concerned. They were essentially promoters of the corporation formed for the avowed purpose of purchasing this property from one other than themselves, and they misrepresented to those whom they induced to join in the enterprise, and who became with them subscribers to the stock of the proposed corporation, the amount the corporation would be required to pay in order to obtain the property, for the

purpose of making \$6,500 secret profit from the subscribers in the transaction, and this secret profit was in fact made. The findings show that their plan from the beginning was to form a corporation to purchase this property, and that they practically procured its foundation. As promoters of the corporation, they occupied a fiduciary relation to their co-subscribers, and were bound to truthfully declare to their associates any personal interest that they had in the matter of the purchase. Without such disclosure they could not legally profit at the expense of their associates. If they were guilty of any misrepresentation in the facts or suppression of truth in relation to their personal interest in the proposed purchase, the corporation is entitled to set aside the transaction, or recover compensation for any loss which it has suffered. * * *

Question 623: How was the second profit made in this case? Were the promoters held liable?

Case No. 624. Cushion Heel Shoe Co. v. Hartt, 50 Lawyers' Reports Anno., new series, 979 (Ind.).

Point Involved: The liability of a corporation for the contracts of its promoters.

SPENCER, J., delivered the opinion of the court:

"It appears from the record in this case that in April, 1909, appellee, who was experienced in the manufacture of shoes, inserted in a shoe journal an advertisement for a shoe factory to locate in the city of Ft. Wayne. Among the answers which he received thereto, was one from a man named Johnson, who was the patentee of a certain cushion heel shoe. Johnson came to Ft. Wayne, and with him appellee went to the president of the Commercial Club, whom they interested in the proposition of starting appellant company. Subscription lists were prepared and appellee started out to get subscribers to the undertaking. He testified that Johnson then promised him the position of superintendent when the factory

should be established, and also promised that he (appellee) should be paid for his time and money spent in securing the stock subscriptions; that after the company was organized, appellee talked with several of the directors and officers of appellant company and told them that he expected to be paid for his services; that one of the directors said to appellee: 'I believe you should be compensated. I have told the people, the directors, to settle with you.' No testimony was introduced to show that the board of directors ever acted on appellee's claim, but it is his contention that, by accepting the results of his services and receiving the benefits thereof, appellant is now bound on an implied contract to pay for such service.

"It is certain that, under ordinary circumstances, a corporation cannot be successfully sued on a contract made for its benefit by its projectors before its incorporation. Contracts of this character, however, are not void, but voidable; and it is well settled in nearly all jurisdictions that, in so far as they are not *ultra vires*, such contracts may become binding on the corporation if ratified by it, either expressly or by implication, after its organization. *Smith v. Parker*, 148 Ind. 127-133, 45 N. E. 770; *Bruner v. Brown*, 139 Ind. 600-602, 38 N. E. 318; *Davis & R. Bldg. & Mfg. Co. v. Hillsboro Creamery Co.*, 10 Ind. App. 42, 37 N. E. 549; *Tuttle v. Tuttle*, 101 Me. 287-292, 64 Atl. 496, 8 Ann. Cas. 260; *Battelle v. Northwestern Cement & Concrete Pav. Co.*, 37 Minn. 89, 33 N. W. 327.

"But the rule that a corporation may be bound, like any individual, by an implied contract, is limited in its application to contracts in which the promoters of such corporation are interested.

"We are aware that cases may be found which seem to sustain appellee's position, but, as is suggested in 10 Cyc. at page 265, 'it is difficult to understand how the corporation could be estopped by accepting benefits which it had no power to reject, without uncreating itself.' We believe that the better reason and the weight

of authority support the holding that, in the absence of statutory or charter provisions, a corporation will be held liable for services rendered by its promoters before incorporating only when, by express action taken after it has become a legal entity, it recognizes or affirms such claim. The evidence before us does not indicate such an affirmation. In *Tift v. Quaker City Nat. Bank*, 141 Pa. 550, 21 Atl. 660, as in this case, it was shown that the plaintiff's claim was brought to the attention of the board of directors after the defendant's incorporation, but that no action was taken thereon. The Court held that 'mere silence of the board of directors, or failure to object when the claim was mentioned, is not such an act of ratification as will bind the bank.' "

Question 624: (1.) Is a promoter the agent of the corporation?

(2.) When will the corporation be liable for the acts of a promoter?

(Note: The rule is everywhere settled that corporations are not liable for the contracts of its promoters merely because made by the promoter. A promoter is not an agent for the future corporation. The corporation may become liable by *adopting* the act of the promoter. Such adoption may be either express, or it may be implied where the corporation accepts property which it has full liberty to decline (10 Cyc. 263). For mere *services*, however, the better opinion seems to be that it will not be liable merely because it receives the benefit, as it cannot well decline it. The promoters are themselves liable on their own contracts. The doctrine "respondent superior" does not apply, as the corporation, not being in existence, cannot be the principal.)

PART XXVI

CORPORATE CAPACITY AND POWERS

Chapter Ninety.	General Corporate Capacities.
Chapter Ninety-one.	Powers of Contractual Nature.
Chapter Ninety-two.	Effect of Acts <i>Ultra Vires</i> .

CHAPTER NINETY

GENERAL CORPORATE CAPACITIES

§ 467. Powers inherent in corporate existence.	§ 468. Power to commit torts.
	§ 469. Power to commit crimes.

Sec. 467. Powers Inherent in Corporate Existence.

Case No. 625. Thomas v. Dakin, 22 Wend. (N. Y.) 9.
(Set out as Case No. 609, *supra*.)

Question 625: Specify the powers inherent in corporate existence as given in this case.

Sec. 468. Power to Commit Torts.

Case No. 626. Pennsylvania Iron Wks. Co. v. Henry Voght Machine Co., 29 Ky. L. Rep. 861, 8 L. R. A. new series 1023.

Facts: The defendant is a Pennsylvania corporation and the plaintiff a Kentucky corporation, and are rivals in the manufacture of ice machines: The Pennsylvania company opened an office in Louisville, Ky., and placed

it in charge of William Wilson. Both companies became bidders to put in an ice machine desired by the Northern Lake Ice Co. of Louisville. The Kentucky corporation was successful and when Wilson learned of this fact, he wrote a libelous letter to the Northern Lake Ice Co. This letter was written on the company's letter head and signed "Pennsylvania Iron Works, Wm. Wilson, Manager, Southern Office." The Kentucky company sues the Pennsylvania company for damages on account of libel. Defendant urges that this was a wrongful act of an employee for whom it is not responsible.

Point Involved: The power of a corporation to commit a tort; whether answerable in libel for the libelous statements of an agent made by him as a part of his act in representing the company.

CARROLL, C.: " * * *

"A corporation is liable in damages for the publication of a libel, as it is for other torts. To establish its liability, the publication must be shown to have been ratified by it, or to have been made by one of its servants or agents in the scope of his employment and in the course of the business in which he was employed. And a corporation may sue for libel upon it, as distinct from the libel upon the individual members. * * * The evidence shows very clearly that Wilson was the duly authorized agent of appellant and in charge of the southern office at the time he wrote the letters. That they were written in the course of his business for appellant, and were within the scope of his employment, is made plain by the fact that they were written for the purpose of obtaining for the appellant the contract to build the ice machine for the Northern Lake Ice Company, and to take this business away from the appellee. This being the sole purpose of the letters, and, Wilson being at the time the general agent of the appellant, it cannot be doubted that in writing it he was acting within the scope of his employment, and therefore appellant is liable for his acts. It may be true that appellant did not authorize

Wilson to insert in these letters the libelous statements they contained, and it may be conceded that they were written without its knowledge or consent, but this will not exonerate it from liability for the wrong perpetrated by him in an effort to obtain business for it. If the appellant is not responsible for this conduct of Wilson, it would be difficult to find a case in which a corporation could be held liable for the acts of its agents in the publication of libelous matter. Corporations transact all their business through agents; and when the agent is acting in the course of his business and within the scope of his employment, the corporation will be held accountable for his acts and doings in the same degree as an individual will be held answerable for torts perpetrated by him in his individual capacity. Where an action will lie against an individual for a tort, it will lie against a corporation, if the tort was committed by its agent or servant in the scope of his employment."

Question 626: (1.) What was the tort of the agent for which the corporation was sought to be held in this case?

Case No. 627. *Stewart v. Wright*, 147 Fed. 321.

HOOK, CIRCUIT JUDGE: " * * *

"While a corporation has no brain to contrive, no tongue to deceive, and no hands with which to strike, it employs in its service the brains and tongues and hands of others; and as it can only operate through natural persons, there is, as there logically should be, a correlative responsibility for the acts of those persons in the course of the corporate business and of their employment, and for any malicious and evil intent with which such acts are attended.

"A few of the multitude of authorities will be sufficient to illustrate the wide range of the modern doctrine. Corporations have been held liable in these cases by attributing to them the conduct of their officers and agents: Assault and battery with a deadly weapon by a railroad

company (Railway v. Harris, 122 U. S. 597, 7 Sup. Ct. 1286, 30 L. Ed. 1146); libel by a railroad company (Railroad v. Quigley, 21 How. 202, 16 L. Ed. 73); fraud and deceit, assault and battery, malicious prosecution, nuisance, and libel (National Bank v. Graham, 100 U. S. 699, 702, 25 L. Ed. 750); fraud by a municipal corporation in reports of distilled spirits to revenue collector (Salt Lake City v. Hollister, 118 U. S. 256, 6 Sup. Ct. 1055, 30 L. Ed. 176); fraud and deceit by a manufacturing company (Butler v. Watkins, 13 Wall. 457, 463, 20 L. Ed. 629); maintenance of a nuisance (Railroad v. Baptist Church, 108 U. S. 317, 2 Sup. Ct. 719, 27 L. Ed. 739); assault and battery by an express company (Southern Ex. Co. v. Platten, 36 C. C. A. 46, 93 Fed. 936); malicious prosecution by a manufacturing company (Copley v. Sewing Machine Co., 2 Woods, 494, Fed. Cas. No. 3213); boycotting by a corporation of which the members were mercantile firms (Hartnett v. Plumber's Supply Assn., 169 Mass. 229, 47 N. E. 1002, 38 L. R. A. 194); malicious prosecution by a savings bank (Reed v. Home Savings Bank, 130 Mass. 443, 39 Am. Rep. 468); false representations as to corporate stock by a manufacturing company (Dorsey Machine Co. v. McCaffrey, 139 Ind. 545, 38 N. E. 208, 47 Am. St. Rep. 290); false imprisonment by a national bank (Wachsmuth v. Nat. Bank, 96 Mich. 426, 56 N. W. 9, 21 L. R. A. 278); conspiracy between a bank through its president and a merchant to defraud those of whom latter purchased goods (Johnston Fife Hat Co. v. National Bank, 4 Okl. 17, 44 Pac. 192). It is also well settled that a corporation cannot escape liability upon a plea that the tortious acts were *ultra vires*. Railroad v. Quigley, 21 How. 202, 16 L. Ed. 73; Merchants' Bank v. State Bank, 10 Wall. 604, 645, 19 L. Ed. 1008; County of Calhoun v. Emigrant Company, 93 U. S. 124, 130; 23 L. Ed. 826; National Bank v. Graham, 100 U. S. 699, 702, 25 L. Ed. 750; Salt Lake City v. Hollister, 118 U. S. 256, 6 Sup. Ct. 1055, 30 L. Ed. 176; Railway v. Harris, 122 U. S. 597, 7 Sup. Ct. 1286, 30 L. Ed. 146; Railway Co. v. Howard, 178 U. S.

153, 160; *Alexander v. Relfe*, 74 Mo. 517; *Zinc Carbonate Company v. First National Bank*, 103 Wis. 125, 79 N. W. 229, 74 Am. St. Rep. 845.

Question 627: Name a number of torts for which corporations have been held responsible.

(Note: Obviously the more usual tort for which a corporation is held is that of *negligence*, as witness the vast amount of personal injury litigation in our courts. See the Cases in Agency for the principles by which an employer is charged with the torts of his employee.)

Sec. 469. Power to Commit Crimes.

Case No. 628. *Telegram Newspaper Co. v. Com.*, 172 Mass. 294.

Facts: The Newspaper Company was a corporation which published an article concerning a trial in progress, for which the Court entered judgment for criminal contempt of court. The Newspaper Company brings the case up to the present court by writ of error.

Point Involved: Whether a corporation can be held guilty of a crime involving evil intent.

FIELD, C. J.: "It is contended that a corporation cannot be guilty of a criminal contempt of court, although it may be fined for what is called a 'civil contempt.' It is said that an intent cannot be imputed to a corporation in criminal proceedings. It has been decided in this commonwealth that a corporation may be liable civilly for a libel or a malicious prosecution. *Fogg v. Boston & L. R. Corp.*, 148 Mass. 513; *Reed v. Home Sav. Bank*, 130 Mass. 443, 39 Am. Rep. 468. We think that a corporation may be liable criminally for certain offenses, of which a specific intent may be a necessary element. There is no more difficulty in imputing to a corporation a specific intent in criminal proceedings than in civil. A corporation cannot be arrested and imprisoned in either civil or criminal proceedings; but its property may be taken, either as compensation for a private

wrong or as punishment for a public wrong. In most of the states of this country corporations may be formed, under general laws, for the purpose of doing almost any kind of business, as easily as partnerships, and many of the newspapers are published by corporations. Although natural persons who publish or assist in publishing a libel in a newspaper owned by a corporation may be punished criminally by fine or imprisonment, or both, yet, if the corporation cannot be punished by a fine, it will escape all criminal liability. The authors of libels are often irresponsible persons, and the remedy by private action against corporations for the publishing of libelous statements is often inadequate. That a corporation may be indicted for a misfeasance as well as for a nonfeasance has been decided in this commonwealth. *Com. v. Proprietors of New Bedford Bridge*, 2 Gray, 339. See *Queen v. Great North of England Ry. Co.*, 9 Q. B. 315, 326. A corporation may be indicted for a libel. *State v. Atchison*, 3 Lea, 729, 31 Am. Rep. 663, and note; *Brennan v. Tracy*, 2 Mo. App. 543; *Pharmaceutical Soc. v. London & P. Supply Asso.*, L. R. 5 App. Cas. 857, 869, 870; 2 Bishop, *New Crim. Law*, Secs. 9, 35; *Newell, Defamation, Slander & Libel*, 2d ed. 362, 363; *Odgers, Libel & Slander*, 3d ed. 436; * * *

Question 628: (1.) What was the crime for which the corporation was sought to be held in this case?

(2.) What was the nature of the business carried on by the defendant? If the corporation had been a manufacturing corporation and one of its agents without actual authority had made statements in contempt of court in connection with a case in court in which it was interested, do you think the corporation could have been fined for such contempt?

Case No. 629. *People v. Rochester R. & L. Co.*, 195 N. Y. 102, 21 L. R. A., n. s. 998.

HISCOCK, J., delivered the opinion of the court:

"The respondent has been indicted for the crime of manslaughter in the second degree, because, as alleged,

it installed certain apparatus in a residence in Rochester in such a grossly improper, unskillful, and negligent manner that gases escaped and caused the death of an inmate. The demurrer to the indictment has presented the question whether a corporation may be thus indicted for manslaughter under Sec. 193 of the Penal Code. Before proceeding to the interpretation of this specific provision, we shall consider very briefly the general question discussed by the parties, whether a corporation is capable of committing in any form such a crime as that of manslaughter.

“Of the correctness of the proposition urged in behalf of the people, that it may do so, subject to various limitations, we entertain no doubt. Some of the earlier writers on the common law held that a corporation could not commit a crime. Blackstone, in his Commentaries, chap. 18, sec. 12, stated: ‘A corporation cannot commit treason or felony or other crime in its corporate capacity, though its members may, in their distinct individual capacities.’ And Lord Chief Justice Holt (Anonymous, 12 Mod. 555) it is said to have held that ‘a corporation is not indictable, although the particular members of it are.’ In modern times, however, the courts and text writers quite universally have reached an opposite conclusion. A corporation may be indicted either for non-feasance or misfeasance, the obvious and general limitations upon this liability being, in the former case, that it shall be capable of doing the act for non-performance of which it is charged, and that, in the second case, the act for the performance of which it is charged shall not be one of which performance is clearly and totally beyond its authorized powers. Bishop, New Crim. Law, Secs. 421, 422. The instances in which it has been held that a corporation might be liable criminally simply because it did or did not perform some act, and where no element of intent was supposed to be involved, are so familiar that any extended reference to them is entirely unnecessary.

“The latest authority in this state upholding such lia-

bility is found in the case of *People v. John H. Woodbury Dermatological Institute*, 192 N. Y. 455, 85 N. E. 697, where it was held that a corporation might be punished criminally for disobeying the statute providing that 'any person not a registered physician, who shall advertise to practice medicine, shall be guilty of a misdemeanor.' There was involved no question of intent, but simply that of disobedience of a statutory provision against doing certain acts. At times courts have halted somewhat at the suggestion that a corporation could commit a crime whereof the element of intent was an essential ingredient. But this doctrine, again with certain limitations, may now be regarded as established, and there is nothing therein which is either unjust or illogical. Of course, it has been fully recognized that there are many crimes so involving personal, malicious intent, and acts so *ultra vires* that a corporation manifestly could not commit them. Wharton, *Crim. Law*, 9th ed. sec. 91; Morawetz, *Priv. Corp.* 2d ed. secs. 732 *et seq.* But a corporation, generally speaking, is liable in civil proceedings for the conduct of the agents through whom it conducts its business so long as they act within the scope of their authority, real or apparent; and it is but a step further in the same direction to hold that, in many instances, it may be charged criminally with the unlawful purposes and motives of such agents while so acting in its behalf.

(The Court holds that the corporation is not guilty of manslaughter under the statute, because manslaughter is defined in New York as the "killing of one human being by the act, procurement, or omission of *another* [human being]." But, the Court says, "We have no doubt that a definition of certain forms of manslaughter might have been formulated, which would be applicable to a corporation, and make it criminally liable for various acts of misfeasance and non-feasance when resulting in death and amongst which very probably might be included conduct in its substance similar to that here charged against the respondent.")

Question 629: (1.) Can a corporation be criminally liable for causing the death of a human being?

(2.) Murder being the crime of unlawfully killing a human being with malice aforethought, do you think a corporation could be guilty of murder? Do you think it could be guilty of arson or burglary because its officer for its benefit committed such crime?

(Note: It was formerly doubted whether a corporation could be indicted for any crime. It may unquestionably be guilty of crimes that do not involve the personal element, as receiving rebates, violating child labor statutes, etc. And in recent cases it has been held for the crime of involuntary manslaughter. But it is doubtful if a corporation could be held for crimes like murder, arson, burglary, and the like.)

Case No. 630. The Overland Cotton Mill Co. v. People, 32 Colo. 263.

(Set out as Case No. 610, *supra*.)

Question 630: What crime was the corporation held for in this case?

CHAPTER NINETY-ONE

POWERS OF CONTRACTUAL NATURE

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| § 470. Express powers. | § 475. Power to loan money. |
| § 471. Implied powers. In general. | § 476. Power to acquire shares in |
| § 472. Power to acquire, hold and
grant real estate. | other corporations. |
| § 473. Power to lease and sell. | § 477. Power to acquire its own
shares. |
| § 474. Power to borrow money, to
mortgage, etc. | |

Sec. 470. Express Powers.

Case No. 631. Attorney General v. Belle Isle Ice Co.,
26 N. W. Rep. (Mich.) 311.

Facts: Suit of *quo warranto* by the Attorney General to determine whether the Belle Isle Ice Co., whose charter provided that it was organized for the purpose of putting up and packing ice and distributing and selling the same, was organized for a purpose authorized by the statute providing for the incorporation of companies for "manufacturing" purposes.

Point Involved: Specifically whether cutting natural ice and selling same is "manufacturing"; generally, a brief discussion of the express charter powers of corporations.

CHAMPLIN, J.: " * * * The law requires the articles of association [the charter] to state distinctly and definitely the purpose for which the same is formed. If it does not state a purpose for which the statute authorizes a corporation to be formed, it would not be legally incorporated, and its articles would afford no warrant

for the exercise of corporate action. If it does state such a purpose, and if the other requirements of the law are complied with it is a legal corporation and authorized to act as such. In either case the articles themselves are the sole criterion to ascertain the purpose for which it was formed, and the intent must be gathered alone from the written instruments and cannot be aided, or varied or contradicted by testimony or averments *aliunde* the instrument itself. The question, therefore, is, is the purpose set forth in the articles such as the statute authorizes the formation of corporations to carry on? We think it is. Its expressed purpose is to manufacture for market Detroit river and lake ice. It was not necessary for the articles to state the means or methods of manufacture, * * *." [The Court here holds that cutting ice as naturally frozen in rivers and lakes is engaging in "manufacturing" as authorized by the statute, and that the company is a legal corporation.]

Question 631: Discuss generally the necessity that the charter powers of a corporation be authorized by law, how such powers should be stated, whether it is necessary that there should be a statement of the manner or means of accomplishing the purpose.

Case No. 632. People v. Chicago Gas Trust Co., 130 Ill. 268.

Facts: Suit by the Attorney General against the Chicago Gas Trust Co., to question by what right it exercises certain powers. The company was formed under the general corporation law of Illinois by filing a statement of incorporation with the Secretary of State and his issuances of a certificate of incorporation. One of the objects stated was the power to hold stock in other gas companies. The general law forbids this being done.

Point Involved: That the powers of a corporation formed by filing statements and certificates under the general corporation act, are determined by the powers and objects as stated in such statements or certificates,

as governed by the general laws of the state, and that powers stated in contravention of the general law are void.

MR. JUSTICE MAGRUDER: “* * *

“The power to purchase and hold stock in other companies must be the subject of legislative grant, if not in all cases, at least in cases where it cannot be implied from the powers expressly granted. The general incorporation law contains no grant of such power by the legislature. Can a corporation organized under that law be clothed with such a power by merely naming it in the statement filed with the Secretary of State? We think not. The action of the Secretary of State in issuing the license and the certificate of organization is necessarily, to a large extent, merely ministerial. (*Oregon Ry. Co. v. Oregonian Ry. Co.*, 130 U. S. 1; 4 Am. & Eng. Ency. of Law, Tit. Corporations, page 192, note 1.) Whether the articles of association, consisting of the Statement, the License, the Report of the Commissioners, the Certificate of Organization, etc., do or do not confer such rights and powers as are authorized by the law, is a matter for judicial determination.”

Question 632: State what the Court held in this case.

Case No. 633. In re Journalists Fund of Philadelphia, 8 Philadelphia Reports, 272.

Proceeding for the approval of a charter.

PAXSON, J.: “This charter is radically defective for the following reasons:

“1. The object of the association is not sufficiently stated. After enumerating for distinct ‘purposes’ for which the association is formed, the charter goes on to say: ‘For such other purposes as may be agreed upon by the association in the future.’

“The law requires the Court to approve the ‘object’ of the association. How can we do so when such object is to be declared in the future?

“* * *

Question 633: What was the question in this case and how did the Court decide it?

Sec. 471. Implied Powers.

Case No. 634. Curtiss and others v. Leavitt, 15 N. Y. 9.

Comstock, J. (page 64): "It is truly said that corporations can only exercise such incidental powers as are necessary to carry into effect, the express objects of their charter. But necessity is a word of flexible meaning. There may be an absolute necessity, a great necessity and a small necessity; and between these degrees there may be many others depending on the ever varying exigencies of human affairs.

"It is plain that corporations, in executing their express powers, are not confined to means of such indispensable necessity that without them there could be no execution at all. The contrary doctrine would lead at once to a very great absurdity; for if there are several modes of accomplishing the end, neither one is indispensable, and each would exclude all the others. And thus, by inevitable logic, an express grant of power would lie forever dormant, because there are more modes than one of carrying it into execution.

"It is almost as difficult to say that the incidental power depends for its existence on the degree of necessity which connects it with the power in chief. Such a doctrine would impose upon courts a never ending difficulty, for the inquiry would always be whether the chosen instrumentality is the very best that could be selected; and if not the very best, however minute the difference may be, then the inevitable decision must follow that the choice was fatally bad, although strictly adapted to the end in view and made in the utmost good faith.

"These demonstrations, for such they appear to me, would seem to leave but one other conclusion which is, that corporations, along with their specific powers, take all the reasonable means of execution, all that are con-

venient and adapted to the end in view, although not the very best by many degrees of comparison. And this is a doctrine which must necessarily result in the liberty of choice amongst those means. The choice may be wise or unwise. If made in the exercise of an intelligent good faith, the wisdom of the selection may be called in question, but the power to make it cannot be."

Question 634: What general rule determines what incidental or implied charter powers are possessed by a corporation?

Case No. 635. Louisville, etc. Co. v. Commonwealth of Kentucky, 146 Ky. 827.

Facts: Suit brought by the State of Kentucky under a law providing that in case a railroad company owns property for more than five years, not devoted to railroad purposes, the same shall escheat to the state. The defendant company's holdings are attacked because it appeared that the defendant company was operating a hotel and using certain lands for park purposes. The railroad company in order to avoid escheat claims that under the circumstances these lands are held for proper and legitimate purposes in the general operation of a railroad. It appeared that the hotel was situated as a depot hotel, that more than 80 trains passed in and out each day, that about 300 employees at that point daily, and that many passengers found hotel accommodations there while transferring from train to train or waiting for trains. The park was a small tract of land contiguous to the right of way and near the depot building, which the railroad had laid out with shrubbery, flowers, shade trees, fountains and walks.

Point Involved: Whether a company organized for general railroad purpose has the implied power to maintain a hotel and small park under the circumstances stated.

LASSING, J.: "The proof in this case shows that the hotel property cost the company more than

\$30,000, and that it spent annually in taxes and repairs upon the hotel building the larger part of the rental derived therefrom, and that it cannot be said that it is running it for profit. On the contrary, the evidence fully justifies the allegation that it is held and maintained solely for the benefit of the public traveling on its trains and such of the employes of appellant as are, from the nature of their duties, required to take their meals and sleep there at Guthrie. Nor is this all. It appears that under the contract of lease the toilets and waiting rooms of the hotel are for the special use of the lady passengers stopping at Guthrie; and a temporary hospital is provided for in one of the rooms of the hotel. The building being under control of the company, it is in a position to see that the wants of the passengers and employes are properly supplied; and while there is some evidence that the prices charged are high, they are not out of proportion to the accommodations furnished. Considering the needs of the place and the character of the use to which this hotel property is put, we are satisfied that the Court did not err in holding that these tracts were not subject to escheat.

“The right of the railroad to hold tract 4 as a park presents a new question. We are furnished no authority by counsel for either side, nor have we been able to find any bearing upon this subject. And yet we know that it is a custom of railroads generally, and particularly the great transcontinental roads, to convert the small, unoccupied tracts of land lying adjacent to and near their depots into miniature parks, and beautify them by planting shade trees, flowers, and shrubbery, and laying walks through them, and frequently, as in the present case, building pools and putting fountains therein. The very fact that this custom has so universally obtained is suggested that it has not been regarded as violative of the rights of the company so to do. Unquestionably, in this way the company adds to the pleasure of its passengers, and frequently to the comfort, both of its passengers and employes; for these parks are not only pleasing

to the eye, but they add materially to the comfort of passengers and employes waiting for the arrival and departure of trains, by affording them a place for recreation and rest. The statutes require that the company shall provide suitable and convenient waiting rooms at all depots for the accommodation of passengers. The object in view is the comfort of the traveling public; and the more perfectly the wants, needs, and interests of the traveling public are provided for, the more popular the road becomes as a common carrier. The maintenance of the park is no wise profitable to the company. On the contrary, it is a source of constant expense. It can serve no possible purpose, except to add to the attractiveness of the depot and its surroundings, and to the comfort of the employes and passengers of the company who are required to be and remain at the depot.

* * *

“Coextensive with the custom of railroads to build and maintain parks at and near their depots is that of building and keeping Y. M. C. A. rooms at points along the line of their road where their employes are required to congregate in numbers. These buildings are erected solely for the benefit of the employes of the company.

* * * In order to justify the railroad to hold land for park purposes, two things must concur: First, the land so held must lie at or near the depot, so as to be of easy access to its passengers and employes; and, second, it must be reasonable in size, taking into consideration the extent of travel to and from such depot and the number of employes whose duties require them to be there. In other words, the park must be in keeping with the size of the place and other accommodations and conveniences furnished by the railroad at that point. If these two necessary prerequisites are complied with, neither the letter nor the spirit of the Constitution or statute will be violated.”

Question 635: (1.) What did the Court hold with reference to the right of the railroad to operate the hotel? What was the

reasoning of the Court? Do you infer from that reasoning that the company could have operated hotels generally?

(2.) With reference to the right to maintain the park, what did the Court hold? On what reasoning?

(3.) Can a railroad corporation properly devote its funds and property to maintain a Y. M. C. A. for its employees?

(4.) The W. M. R. Co. in anticipation of increased business guaranteed the payment of the dividends on the stock and the interest on the bonds of the B. R. Hotel Company, a summer hotel located in a town upon its railroad. No connection with the railroad business is shown, except that it increased the traffic of the railroad. Is the contract within the power of the corporation? (Western Maryland R. Co. v. Blue Ridge Hotel Co., 102 Md. 307, 2 L. R. A. new series, 887.)

(5.) Do you think that the *mere* fact that an activity of a corporation is profitable to it, would decide whether the activity was within the power of the corporation?

Case No. 636. Central Lumber Co. v. Kelter, 201 Ill. 502.

Facts: The lumber company is sued as surety on a bond executed by a building contractor. The contractor gave the bond to protect the owner of the building against his default, and the lumber company became surety on the bond. The lumber company executed the bond in order to obtain the contract for the sale of the lumber to be used in the building. Defense by the lumber company that it had no power to execute the bond.

Point Involved: Whether a lumber company has power to become surety on a building contractor's bond as a part of its act in securing the sale of lumber to said building contract.

MR. JUSTICE WILKIN: “* * * It is again contended that the bond sued on was *ultra vires* the power of the corporation. The company was organized for ‘the purchase and sale of lumber and all adjuncts for carrying on a general lumber business.’ If the bond was executed on the part of the corporation for the purpose of securing a sale of lumber to Rafferty, the contractor, the making of the bond was within its implied powers.”

Question 636: (1.) State the facts, the question presented and the Court's decision in the above case.

(2.) The A brewery company having no express power to loan money, loaned B, a saloonkeeper, a sum of money, to enable him to start in the saloon business in which the brewery company's beer would be sold. Is this act within the charter powers of the corporation? (*Kraft v. West Side Brew. Co.*, 219 Ill. 205.)

Case No. 637. *Best Brewing Co. v. Klassen*, 185 Ill. 37.

Facts: The Brewing Company is sued upon an appeal bond. The bond was given by an appellant in a case to which the Brewing Company was not a party, and the Brewing Company signed said bond as surety thereon.

Point Involved: Whether a corporation organized for brewery purposes is within its charter power in becoming surety upon an appeal bond, no direct advantage in the prosecution of the business of the company being thereby shown.

MR. JUSTICE WILKIN: "We think the primary question here is not whether appellant has reaped a benefit from the act of becoming surety for Rounds upon the bond, but whether the act of signing it was within the scope of its corporate authority. The purpose of the corporation, as expressed in its charter, is to manufacture and sell ale, beer and porter and carry on a general brewing business. It would seem no acts could be more unlike than the doing of those authorized by the charter of the company, and the signing of the appeal bonds as surety. The instrument was executed in a suit not by or against the corporation, but by a third person against another to recover possession of the house. *Prima facie* the signing of the company of an appeal bond in such a suit was an act beyond the purpose for which it was organized, and consequently illegal. If it had been shown that it was executed clearly for the purpose of promoting or protecting its own business of brewing or selling beer, etc.,—that is to say, if the act had been reasonably necessary to accomplish the end for which the corporation was

formed—it would have been within the scope of the corporate power. But it cannot be held that every act in furtherance of the interests of a corporation is *inter vires*. Many acts can be suggested which though beneficial to the business of a corporation, are too remote from its general purposes to be deemed reasonably within its implied powers. What is and what is not too remote must be determined according to the facts of each case. The rule has been stated to be: In exercising powers conferred by its charter, a corporation may adopt any proper and convenient means tending directly to their accomplishment, and not amounting to the transaction of a separate, unauthorized business.”

Question 637: (1.) State the facts in this case and the Court’s decision.

(2.) How does this case differ from the preceding case?

Sec. 472. Implied Power to Acquire, Hold and Grant Real Estate.

(See the cases of Louisville, etc. Co. v. Com. of Kentucky, *supra*.)

Case No. 638. Barnes v. Suddard, 117 Ill. 237.

Facts: Suit in ejectment brought by plaintiff to oust the defendant from certain real estate. Both parties claim title from Charles D. Fairbanks as a common source. Charles D. Fairbanks conveyed to A. P. Fairbanks, who conveyed to plaintiff. Before this conveyance by Charles D. Fairbanks, through which plaintiff traces his title, Charles D. Fairbanks had conveyed the property to the United States Steam Feed Co., a corporation organized under the laws of Connecticut, and through that deed defendant traces his line of title. Plaintiff contends that the deed to such corporation was void and therefore no title had passed out of Fairbanks prior to the time he conveyed to plaintiff’s grantor. The corporation was chartered by the state of Connecticut “to make and sell feed for horses and cattle, * * *,”

and to buy and sell and deal generally in such real and personal estate as may be necessary and convenient in the prosecution of said business. The statutes of Connecticut provided that any corporation may hold property necessary for its purposes and such as shall be taken in payment of or as security for debts due to it." The statutes of Illinois (where the land in question is situated) provided that corporations may own, possess and enjoy so much real and personal estate as shall be necessary for the transaction of their business, and also that foreign corporations doing business in the state shall be subject to like limitations as the home corporations and shall have no other or greater powers. The land in question was acquired by the corporation in exchange for the right granted by it to make, use and sell feed for horses and cattle in the state of Colorado under the letters patent held by the corporation. This was the only business ever transacted in Illinois and the land was never used for corporate purposes and evidently was not purchased for any corporate purpose.

Point Involved: The power of a corporation to acquire, hold and grant real estate; whether anyone except the state may question such power.

MR. JUSTICE CRAIG:

"If we are correct in this position, that the Connecticut corporation had the power to acquire real estate in this state necessary for the transaction of its business, or such as may be taken in payment or as security for debts, as we think it is clear it had, the remaining question to be determined is, whether the deed is void for the reason and upon the ground that the property purchased was not necessary for the transaction of the business of the corporation. It will be remembered that this question arises collaterally, and not in a direct proceeding against the corporation to determine its powers, rights or privileges. Dillon, in his work on Municipal Corporations, Sec. 444, in the discussion of the question says: 'Whether a municipal corporation with power to purchase and hold

real estate for certain purposes, has acquired and is holding such property for other purposes, is a question which can only be determined in a proceeding instituted at the instance of the state. If there is capacity to purchase, the deed to the corporation divests the estate of the grantor, and there is a complete sale; and whether the corporation, in purchasing, exceeds its powers, is a question between it and the state, and does not concern the vendor or others.' The rule announced by Dillon has been indorsed by two well considered cases in Indiana—Hayward v. Davidson, 41 Ind. 214, and Baker v. Neff, 73 id. 68. Other states where the question has been presented, adopted the same rule, and the Supreme Court of the United States, in National Bank v. Matthews, 98 U. S. 628, hold to the same doctrine.

“* * * Had the corporation been clothed with no power to acquire real estate in this state, or if the purchase had been prohibited by statute or contrary to the manifest policy of our laws, a different question would be presented, and the cases of Carroll v. East St. Louis, 67 Ill. 568, and Starkweather v. American Bible Society, 72 id. 50, might properly be invoked as authority; but such is not the case.”

Question 638: (1.) What *express* power by charter law did the corporation in question have to hold real estate?

(2.) What did the Court hold about the right to raise in this case the question of the power to hold real estate? Why?

(3.) Who could raise the question?

(4.) Suppose this corporation had *no* power to hold real estate for *any* purpose, what did the Court suggest would then have been the result?

Sec. 473. Power to Lease and Sell.

(Note: A private corporation has power to lease and sell any or all of its property. Public service corporations have no such right except pursuant to statute or their charter.)

Sec. 474. Power to Borrow Money, to Mortgage, etc.

Case No. 639. Alton Mfg. Co. v. Garrett Biblical Institute, 243 Ill. 298.

Facts: The Alton Mfg. Co. sued the Garrett Biblical Institute on three promissory notes. They were signed "Garrett Biblical Institute, by Robert D. Shepherd, treasurer." They were payable to the order of Everett O. Fisk, and were endorsed by Fisk to the Alton Mfg. Co. The institute denied that the notes were its notes and relied on its lack of charter power to make the notes, and also on the authority of the treasurer to bind it on the notes. The evidence was that the treasurer was also a trustee, and that he was given by the board an extensive fiscal authority, including the power to borrow money for some purposes. The Court peremptorily directed a verdict for the defendant, and the plaintiff appeals to the present Court.

MR. CHIEF JUSTICE FARMER delivered the opinion of the Court:

"The first question necessary to be determined is whether the Garrett Biblical Institute, under its charter, was authorized to borrow money for its corporate purposes. The answer to this question must depend upon the provisions of the charter under which the corporation is operating, for the powers which any corporation is permitted to exercise are those, only, which its charter confers upon it, either by express grant or by implication, and the implied powers are recognized and given effect for the purpose of enabling such bodies to exercise the express powers granted. An incidental power is one that is directly and immediately appropriate to the execution of the specific power granted, and not one that has a slight or remote relation to it. * * *

"The Garrett Biblical Institute is a charitable corporation, created primarily for educational purposes. It is expressly empowered to establish and maintain within the bounds of Cook county a biblical institute under the patronage and control of the Methodist Episcopal Church. The conduct and control of the corporation are placed in a board of trustees. * * * It is expressly declared that appellee 'shall be capable, in law, of taking and

holding, by gift, grant, devise or otherwise, and of purchasing, holding and conveying, both in law and equity, any estate or interest therein, real, personal or mixed, and shall have power to execute and fulfill all such trusts as may be confided to said corporation, and to take, hold, use, manage, lease and dispose of all such trust property as may in any manner come to said corporation charged with any trust or trusts in conformity therewith.'

"It will be observed that the power to borrow money and issue notes therefor is not expressly granted to appellee by the terms of its charter. But the almost universal rule of law is, that corporations possess the implied power to borrow money when necessary to carry out the purposes of their organization, and when such power is possessed and debts contracted thereunder a corporation may execute its notes or other customary evidences of indebtedness therefor. * * *

"The charter of appellee does, however, grant to it the express power of purchasing, holding and conveying, in law and equity, any estate or interest therein, real, personal or mixed, and the power to hold, use and manage the same. Under this power it cannot be questioned that appellee may expend money for the purchase of real estate for the use of the institute and to maintain and keep it in repair, and it is equally clear that if it did not possess the ready funds at a time when it might be necessary to the purposes of the corporation to make a purchase of real estate or necessary to make expenditures for needed repairs and maintenance of property which it owned, under its charter it possessed the implied power to borrow money for such purposes and give its notes therefor. The trustees having power to borrow money for proper corporate purposes and execute notes therefor, might exercise this authority in a number of ways: (1) They might appoint one of their number as agent of the corporation for that purpose and expressly or impliedly clothe him with authority to borrow money and give notes; (2) where no actual authority has been conferred upon the agent of the corporation to borrow money

and give notes but where the agent has done so, and with full knowledge of all the facts the corporation has approved and ratified the acts of the agent, it will be liable to the same extent as if actual authority had been given to perform the acts; (3) where no authority had been given or existed in the agent to borrow money but where the corporation received the use and benefit of the money it will be liable; (4) by holding an agent out to the public as possessing authority to exercise the powers assumed by the agent and to do the acts performed by him, in which case the corporation would be bound to the extent of the agent's apparent authority.

"Our first inquiry, then, relates to the correctness of the ruling of the trial court in holding that there was no evidence tending to show that Dr. Shepherd, treasurer and 'business agent' or 'business manager' of the corporation, had ever been given any authority by the trustees to borrow money and execute the notes of the corporation therefor. This necessitates an examination of the testimony to some extent." [Here the court reviews the evidence. The court then concludes that the evidence produced by the plaintiff was sufficient to go to the jury, and concludes as follows]:

"The evidence, we think, was sufficient to justify submitting to the jury the liability of appellee on three grounds: First, whether the money was borrowed by authority, express or implied, of the corporation; second, if not borrowed in pursuance of authority previously given, did the corporation, after knowledge of the fact of its being borrowed, approve or ratify it? Third, if it was borrowed without previous authority, and was not afterwards, with knowledge, ratified by the corporation, did it receive the use and benefit of the money? It will, of course, be understood that we do not intend, by what is said herein, to express any opinion as to the weight of the evidence. What we have held is, that upon certain grounds mentioned, the evidence was sufficient to require the case to be submitted to the jury.

“The judgments of the Appellate and Municipal courts are reversed and the cause remanded.”—*Reversed and remanded* [for new trial].

Question 639: (1.) How does the Court define an “implied” or “incidental power”? What do such powers, generally speaking, include?

(2.) Did this corporation have express power to borrow money? Did it have implied power?

(3.) Did the treasurer, by virtue of his office, have power to borrow money? Could he be given that power?

(4.) What three questions were put by the Court, as questions which the plaintiff was entitled on its evidence to have a jury answer?

Sec. 475. Power to Loan Money.

Case No. 640. Canning Co. v. Stanley, 133 Iowa 57.

McCLAIN, J.: “* * * While it is true as a general proposition, that a corporation authorized by its articles only to carry on a mercantile or manufacturing business has no authority to engage in the business of loaning money, it does not follow that it has not the power in the management of its funds to loan them out temporarily at interest when not needed in the prosecution of its business. The loaning of money not being expressly prohibited to the corporation it may as we think without any question make such temporary disposition of the funds which it has on hand from time to time as to secure a profit, the very object of its organization being to earn money for its stockholders in the prosecution of its business. Such a temporary and incidental loaning of money is not the engaging in the business of making loans which is outside the scope of the authority of manufacturing corporations.”

Question 640: Has a manufacturing or commercial corporation the power to loan money?

(Note: Loaning money is ordinarily beyond the power of a corporation not organized for banking purposes. Accordingly

a loan of its funds made by its President or other officers can usually be recalled prior to the maturity of the loan.)

Sec. 476. Power to Acquire Shares in Other Corporations.

Case No. 641. *Converse v. Emerson & Co.*, 242 Ill. 619.

Facts: Converse, as receiver of Minnesota Thresher Mfg. Co., brings suit against Emerson, Talcott & Co. to recover assessments levied by the Minnesota courts on the stock of the Minnesota Company, and in which the Emerson Company appears as an original subscriber. The Emerson Company had been a creditor of the N. W. Mfg. and Car Co. Such company having become insolvent, its creditors, including the Emerson Company organized a new company, the present Minnesota Thresher Mfg. Co., whose charter stated that its object was to take over the capital stock and assets of the former company and to engage in a manufacturing business. The Minnesota statute provides for a double liability on shareholders in the event of insolvency and an assessment is now made according to such law. Suit is brought in the Illinois courts to enforce such liability.

Point Involved: Whether a corporation can be a subscriber to the shares or a stockholder in another corporation.

MR. JUSTICE COOKE: “* * *

“A corporation is but the creature of the statute, and it can exercise no greater powers than those which are expressly conferred upon it by its charter or which must be necessarily implied from its charter. The charter of the appellee company empowered it only to engage in the business of manufacturing and selling certain articles. It had no authority, either express or implied, to participate in the organization of other corporations, either for speculative or for manufacturing purposes. It is earnestly contended on the part of the appellant that the stock in question was taken by the appellee com-

pany simply to secure an indebtedness, and that it was clearly within the powers of appellee to take and hold the stock for this purpose, and that by so taking and holding it the appellee company assumed all the liabilities of a legitimate holder of the stock. Without passing upon the question whether, in any event, the appellee would have the right to take the stock of another corporation to secure the payment of an existing indebtedness, we do not agree with the view of appellant. Under the facts as agreed upon in this case it is clear that the appellee company did not receive this stock in payment of a debt. The thrasher company was not indebted to appellee. The debt referred to was owing to appellee by a different corporation. The appellee became one of the organizers of the thrasher company for the purposes for which that company was incorporated and was one of the original subscribers for its stock. Its act in so doing was *ultra vires* its charter and void, and this suit cannot be maintained thereon. *People v. Pullman Car Co.*, 175 Ill. 125; *People v. Chicago Gas Trust Co.*, 130 id. 268; *National Home Building Assn. v. Home Savings Bank*, 181 id. 35.

“Appellant further contends that appellee is now estopped from setting up the doctrine of *ultra vires* for the reason that for a period of twenty-three years it held the stock and participated in the management of the thrasher company and received all the benefits accruing to a stockholder. It appears that no dividends have ever been declared on this stock. If any material benefit has been received by appellee on account of its supposed ownership of this stock the appellant herein has an adequate remedy. In the case of *National Home Building Ass. v. Home Savings Bank*, *supra*, it is held that a contract beyond the power of a corporation to make is void, and the fact that the corporation has received the benefits thereof or the other parties have acted thereunder does not estop the corporation from raising the defense of *ultra vires*.”

Question 641: Can a corporation acquire shares in another corporation? For what purposes would its acquisition of stock be upheld?

(Note: This is the general rule, unless the governing law gives the corporation the power. It is generally held that for the purpose of protecting its own credits, it may acquire shares, holding such shares as property, rather than as a shareholder and disposing of them as soon as possible without sacrifice.)

Sec. 477. Power to Acquire Its Own Shares.

(Note: A corporation may acquire its own shares, when no fraud on the law, on other stockholders or creditors is thereby attempted.)

CHAPTER NINETY-TWO

EFFECT OF ACTS ULTRA VIRES

- | | |
|---|------------------------------------|
| § 478. The meaning of <i>ultra vires</i> . | § 481. Same subject; benefits re- |
| § 479. Right of stockholder to ob- | ceived by party raising de- |
| ject to act <i>ultra vires</i> . | fense; the strict view. |
| § 480. Right to raise defense of <i>ultra</i> | § 482. Same subject; another view. |
| <i>vires</i> ; act executory on | |
| both sides. | |

Sec. 478. The Meaning of Ultra Vires.

Case No. 642. National Home Building & Loan Association v. Home Savings Bank et al., 181 Ill. 35.

(Set out as Case No. 644, *post*.)

Question 642: What is meant by the term *ultra vires*? How distinguished from the term *intra vires*?

(Note: In the previous chapter we have inquired into the power of the corporation to do various things. The question remains: suppose that it does contract to do an act undoubtedly beyond its power (*ultra vires*), can it, on being sued, set up the defense that the contract is not binding on it because beyond its power to make? Can the other party, on being sued, set up the defense that corporation has no power to make the contract upon which it sues? Suppose benefits have been received under the contract, will this affect the result?)

Sec. 479. Right of Stockholder to Object to Act Ultra Vires.

(See Case No. 678, *post*.)

Sec. 480. Right to Raise Defense of Ultra Vires; Act Executory on Both Sides.

Case No. 643. Nassau Bank v. Jones et al., 95 N. Y. 115.

“While executed contracts, made by corporations in excess of their legal powers, have, in some cases, been upheld by the courts, and parties have been precluded from setting up, as a defense to actions brought by corporations, their want of power to enter into such contracts * * * this doctrine has never been applied to a mere executory contract which is sought to be made the foundation of an action, either by or against such corporations. It was said by Judge Selden, in *Tracy v. Talmage* (14 N. Y. 179), ‘That a contract by a corporation, which it has no legal capacity to make, is void and cannot be enforced, it would seem difficult to deny.’ In *White v. Buss* (3 Cushing, 448), Chief Justice Shaw lays down the rule as follows: ‘It is well settled by the authorities that any promise, contract or undertaking, the performance of which would tend to promote, advance or carry into effect an object or purpose which is unlawful, is in itself void and will not maintain an action.’ ”

Question 643: If a contract beyond the power of a corporation and is still executory on both sides can either party refuse to carry it out?

(Note: A few courts are opposed to this view and refuse to allow the defense to be set up even if the act is entirely executory on both sides. Thus in *Harris v. Independence Gas Co.*, 76 Kan. 750, the Court says: “The Court is convinced of the soundness of the view, that in the absence of special circumstances affecting the matter, neither party to even an executory contract should be allowed to defeat its enforcement by the plea of ultra vires.” But this is opposed to the weight of authority.)

Sec. 481. Same Subject; Benefits Received by Party Raising Defense; the Strict View.

Case No. 644. National Home Building Association v. Bank, 181 Ill. 35.

MR. CHIEF JUSTICE CARTWRIGHT: "It is also argued that the building and loan association is estopped to raise the question whether the contract was *ultra vires* because it has received the benefit of the contract by the conveyance of property to it. That depends, as we think, upon the sense in which the term *ultra vires* is used. It has been applied indiscriminately to different states of fact in such a way as to cause considerable confusion. When used as applicable to some conditions, it has been frequently said that a corporation is estopped to make such a defense where it has received the benefit of the contract. For example, the term has been applied to acts of directors or officers which are outside and beyond the scope of their authority, and therefore are invasions of the rights of stockholders, but which are within the powers of the corporation. In such a case the act may become binding by ratification, consent and acquiescence, or by the corporation receiving the benefit of the contract. Again, it has been applied to cases where an act was within the authority of the corporation for some purposes or under some circumstances, and where one dealing in good faith with the corporation, had a right to assume the existence of the conditions which would authorize the act. Where an act is not *ultra vires* for want of power in the corporation but for want of power in the agent or officer, or because of the disregard of formalities which the law requires to be observed, or is an improper use of one of the enumerated powers, it may be valid as to third persons. In the more proper and legitimate use of the term, it applies only to acts which are beyond the purpose of the corporation, which could not be sanctioned by the stockholders. There would, of course, be no power to confirm or ratify a contract of that kind, because the power to enter into it is absolutely wanting. If there is no power to make the contract there can be no power to ratify it, and it would seem clear that the opposite party could not take away the incapacity and give the contract vitality by doing something under it. It would be contradictory to say

that a contract is void for an absolute want of power to make it, and yet it may become legal and valid as a contract, by way of estoppel, through some other act of the party under such incapacity, or some act of the other party chargeable by law with notice of the want of power.

“The powers delegated by the state to the corporation are matters of public law, of which no one can plead ignorance. A party dealing with a corporation having limited and delegated powers conferred by law is chargeable with notice of them and their limitations, and can not plead ignorance in avoidance of the defense.”

Question 644: What is the doctrine of this case? Give the reasons supporting it.

(Note: In *De La Vergne Co. v. German Sav. Inst.*, 175 U. S. 40, at page 59, the Court says: “The doctrine that no recovery can be had upon the contract is based upon the theory that it is for the interest of the public that corporations should not transcend the limits of their charters; that the property of stockholders should not be put to the risk of engagements which they did not undertake; that if the contract be prohibited by statute every one dealing with the corporation is bound to take notice of the restrictions in its charter, whether such charter be a private act or a general law under which corporations of this class are organized.”)

Case No. 645. *Converse v. Emerson & Co.*
(Set out as Case No. 641, *supra*.)

Question 645: What was the argument made in this case? Did it prevail?

Sec. 482. Same Subject; Another View.

Case No. 646. *Denver Fire Ins. Co. v. McClelland*, 9 Colo. 11.

Facts: The Denver Fire Ins. Co. is sued on a policy of insurance by which it purported to insure McClelland

against loss of certain crops by hail. McClelland paid \$3 and gave his promissory note for \$58.03 as the premium. A loss by hail occurred, and defendant is sued and states that it has no power to issue the kind of insurance in question, and that therefore the policy is void, and for that reason it is not responsible for the loss; and offers to return the premium paid to it by plaintiff.

Point Involved: Whether the corporation is estopped by the receipt of benefits to plead *ultra vires* when sued on a contract it has no charter power to make.

BECK, C. J., and HELM, J.: "Private corporations are creatures of statute, and derive their powers solely therefrom. Upon weighty considerations of public policy, and of private equity as well, the principle has been universally recognized that the charters or general laws through which these corporations derive their existence absolutely control their action; that a contract made or an act done by them which is not in any manner authorized by some express provision of the charter or law of incorporation, or which may not be clearly implied therefrom is *ultra vires*; and that such usurpation of power may be relied upon as a complete defense to a suit growing out of the unauthorized act or contract.

"But for the purpose of avoiding the infliction of manifest injustice in given cases, many courts of the highest respectability have seen fit to recognize an exception to the foregoing doctrine. This exception when admitted, is always based upon principles largely analogous to those supporting equitable estoppels. The decisions recognizing it hold that where a corporation receives and retains the full benefit of a contract, and a failure to perform on its side would result in palpable injustice to the other contracting party, it is estopped from escaping liability thereunder through a plea of *ultra vires*.

"We are inclined to the opinion that cases sometimes arise wherein this exception, properly understood and limited, should be held applicable. If a private corpora-

tion has accepted and retained the full benefits of a contract which it had no power to make, the same having been performed by the other party thereto; and if the transaction is of such a nature that the party thus performing will suffer manifest injustice and hardship unless permitted to maintain his action directly upon the contract, no other adequate relief being at his command, we think the defense of *ultra vires* may be disallowed. This, however, does not do away with the objectionable character of the unauthorized contract. It admits the legal wrong committed by the usurpation of power, but denies the equitable right of the corporation to profit through such wrong at the expense of parties contracting with it; the corporation having received and retained the benefit of the contract, is denied the privilege of invoking the illegality of its act, and thus avoiding consequences naturally flowing therefrom.

“The circumstances attending and surrounding the transaction now before us, in our judgment, render this an appropriate case for the application of the foregoing equitable doctrine. For this reason we concur in the conclusion arrived at by Mr. Justice Stone, who writes the principal opinion.”

Question 646: State the doctrine of this case.

PART XXVII

STOCK AND STOCKHOLDERS

Chapter Ninety-three.	Capital Stock, Shares and Certificates.
Chapter Ninety-four.	Subscription to Stock.
Chapter Ninety-five.	Liability of Shareholder.
Chapter Ninety-six.	Transfer of Shares.
Chapter Ninety-seven.	Various Rights of Shareholders in Going Concern.

CHAPTER NINETY-THREE

CAPITAL STOCK, SHARES AND CERTIFICATES

§ 483. Capital stock defined.	§ 485. Certificate.
§ 484. Division into shares; kinds of stock.	§ 486. Increase and decrease of capital stock.

Sec. 483. Capital Stock Defined.

Case No. 647. State v. Morristown Fire Ass'n, 23 N. J. L. 195.

Point Involved: The definition of capital stock; its distinction from the property of the corporation.

CHIEF JUSTICE GREEN: "The phrase 'capital stock' as employed in acts of incorporation, is never, that I am aware, used to indicate the value of the property of the company. It is very generally, if not universally, used to designate the amount of capital to be contributed by

the stockholders for the purposes of the corporation. The amount thus contributed constitutes the 'capital stock' of the company. The *value* of the stock may be greatly increased by surplus profits or be diminished by losses, but the amount of the capital stock remains the same.

"The funds of the company may fluctuate. Its capital stock remains invariable, save by legislative enactment. This distinction between *the value of the property* of incorporated companies and their *capital stock* is perfectly familiar."

Question 647: Define capital stock; how does it differ from the property of the corporation?

Sec. 484. Division Into Shares; Kinds of Shares.

Case No. 648. *Storrow v. Texas Consol. Comp. & Mfg. Asso.*, 87 Fed. 612.

SWAYNE, D. J.: " * * *

"A share of stock has been defined to be a right which its owner has in the management, profits, and ultimate assets of the corporation; but he has no legal title to the profits or property of the corporation until a dividend is declared, and a division made on the dissolution of the corporation. Common stock differs in many ways from what is termed 'preferred stock.' The owner of the former is entitled to an equal pro rata division of the profits, if there be any, but has no advantage of any other shareholder or class of shareholders of common stock. Preferred stock, on the other hand, generally entitles its owner to dividends out of the net profits before and in preference of the holders of the common stock. Generally, the rights, powers, and privileges of preferred stockholders depend upon the terms upon which it is issued; preferred stock making a multiplicity of forms, according to the desire or ingenuity of the stockholders, and the necessity of the corporation itself. The percent-

age of preferred stock dividends is always fixed before it is issued. It is a matter of contract, and may be made cumulative, as it was in this case. Every holder of preferred stock, by its terms, was guaranteed a dividend of 6 per cent per annum thereon to be paid out of the net earnings of the association, which are properly the gross receipts, less the expenses of operation, interest on debts, and other liabilities payable first. The rest is the net profits out of which the shareholders of preferred stock should be paid the 6 per cent dividend. While it was largely a matter of discretion with the board of directors as to what use they would put the profits to, whether to declare a dividend or use them in the business of the company, there is a limit to this discretion; and the courts will not allow the directors to use their powers oppressively by refusing to declare a dividend while the net profits and character of the business clearly warrant it. This rule is applicable not only to the holders of the common stock, but also to the preferred stock, which is entitled, as a matter of right, to have a dividend declared out of the net profits, if it can be shown that the directors did not exercise reasonable discretion in withholding the same. By the final dissolution of the corporation, the holders of the preferred stock would be entitled to receive only the full face-value thereof, after which the balance of the property would be equally divided among the common stockholders."

Question 648: (1.) Define a share of stock.

(2.) How does common differ from preferred stock?

Sec. 485. Certificates.

Case No. 649. Chester Glass Co. v. Dewey, 16 Mass. 94.

Facts: Suit against Dewey on his stock subscription and an assessment made on his share. Denial by defendant that he is a stockholder, for several reasons, one of which is, that he was never issued a certificate of stock.

Point Involved: Whether a stock certificate is essential to constitute one stockholder.

PARKER, C. J.: “* * * It is insisted, *secondly*, that he cannot be a member, without a certificate of his share; it being provided by the general act upon this subject that the stock shall be divided into shares, and that certificates shall issue to the stockholders. But it was not essential to the existence of the corporation, that certificates should have been issued. The corporation might be compelled, if there were a court of chancery, to give certificates; but still for want of them the stockholders would not lose their rights. The defendant never demanded a certificate. If he had and it had been refused, perhaps he might have declined being a member. But a certificate was, in fact, offered to him before his action was brought.”

Question 649: Can one be a stockholder in a corporation without a certificate? Is he entitled to a certificate? How could he compel its issuance?

(Note: On the question of transfer of stock, forged and stolen certificates, see *post*, in this part.)

Sec. 486. Increase and Decrease of Capital Stock.

(Note: Change in amount of capital stock either by increase or decrease can be effected only by complying with the statute authorizing such change. There is no power in the stockholders or directors to change the amount of capital stock, except in compliance with the general law whereby such change becomes a matter of public record.)

CHAPTER NINETY-FOUR

SUBSCRIPTION TO STOCK

§ 487. Subscriptions upon condition. § 488. Subscriptions secured by fraud.

Sec. 487. Subscriptions Upon Condition.

Case No. 650. Minneapolis Threshing Machine Co. v. Davis, 40 Minn. 110.

Facts: Suit brought on a contract of subscription for stock. Defendant gave his subscription in writing to a promoter of the company, on the condition, orally stated, that the promoter should make no use of it unless certain other parties subscribed, who did not subscribe. The other subscribers and the corporation was unaware of this condition. The promoter violated the condition and turned in the subscription. Defendant never took any other part in the organization of the company except as stated.

MITCHELL, J.: “* * *

“Under the elementary rule of evidence that a written agreement cannot be varied or added to by parol, it is not competent for a subscriber to stock to allege that he is but a conditional subscriber. The condition must be inserted in the writing to be effectual. This rule applies with special force to a case like the present, where to allow the defendant now to set up a secret parol arrangement by which he may be released, while his fellow-subscribers continue to be bound, would be a fraud, not only upon them, but upon the corporation which has

been organized on the faith of these subscriptions and upon its creditors. The defendant of course does not attempt to controvert so elementary a rule as the one suggested, but contends that the effect of this evidence was not to vary or contradict the terms of the writing, but to prove that there was never any delivery of it, and hence that there never was any contract at all, delivery being prerequisite to the very existence of a contract. His claim is that the subscription paper was given to and received by Janney merely as an escrow, or as in the nature of an escrow, only to be delivered or used upon the performance of certain conditions precedent, and that until they were performed there could be no valid delivery.

“In determining this question it becomes important to consider the nature of a subscription to the stock of a proposed corporation, and the relation of the different parties to each other, under the facts of this case. A subscription by a number of persons to the stock of a corporation to be thereafter formed by them has in law a double character: First, it is a contract between the subscribers themselves to become stockholders without further act on their part immediately upon the formation of the corporation. As such a contract it is binding and irrevocable from the date of the subscription (at least in the absence of fraud or mistake), unless cancelled by consent of all the subscribers before acceptance by the corporation. Second, it is also in the nature of a continuing offer to the proposed corporation, which, upon acceptance by it after its formation, becomes as to each subscriber a contract between him and the corporation. 1 Mor. Priv. Corp., Sec. 47 *et seq.*; Red Wing Hotel Co. v. Frederick, 26 Minn. 112 (1 N. W. Rep. 827). Janney, the promoter who solicited and obtained the subscriptions, occupied the position of agent for the subscribers as a body, to hold the subscriptions until the corporation was formed in accordance with the terms and conditions expressed in the agreement and then turn it over to the company without any further act of delivery

on part of the subscribers. The corporation would then become the party to enforce the rights of the whole body of subscribers. It follows, then, that considering the subscription as a contract between the subscribers, a delivery to Janney by a subscriber was a complete and valid delivery, so that his subscription became *eo instanti* a binding contract. The case stands precisely as a case where a contract is delivered by the obligor to the obligee. It cannot therefore be treated as a case where a writing has been delivered to a third party in escrow.

“This subscription agreement was not intended to be the sole contract of defendant. It was designed to be also signed by other parties, and from its very nature defendant must have known this. Each succeeding subscriber executed it more or less upon the faith of the subscriptions of others preceding his. The paper purports on its face to be a completed contract, containing all the terms and conditions which the subscribers intended it should. When this agreement was presented to others for subscription, defendant had not only signed it in this form, but he had also done what, under the facts, constituted, to all outward appearances at least, a complete and valid delivery. He had placed it in the proper channel according to the ordinary and usual course of procedure for passing it over to the corporation when organized, and clothed Janney with all the *indicia* of authority to hold and use it for that purpose without any other or further act on his part, untrammelled by any condition other than those expressed in the writing. In reliance upon this, others have not only subscribed to the stock, but have since paid in a large share of it. The corporation has been organized and engaged in business, expending large sums of money, and contracting large liabilities, all upon the strength of these subscriptions to its stock, and in entire ignorance of this secret oral condition which defendant now claims to have attached to the delivery. To permit defendant to relieve himself from liability on any such ground, under this state of facts, would be a fraud on

others who have subscribed and paid for stock, upon the corporation which has been organized and incurred liabilities in reliance upon the subscriptions, and on creditors who have trusted it. The familiar principle of equitable estoppel by conduct applies, viz.: Where a person, by his words or conduct, wilfully causes another to believe in the existence of a certain state of facts, and induces him to act on that belief so as to alter his own previous condition, he is estopped from denying the truth of such facts to the prejudice of the other.”

Question 650: What was the defense in this case? Was it allowed or not? Give the reasons.

Sec. 488. Fraud in Securing Subscriptions.

Case No. 651. Morgan v. Skiddy, 62 N. Y. 319.
(Set out as case No. 687, *post*.)

Case No. 652. Gress v. Knight, 135 Ga. 60, 31 L. R. A. N. S. 900.

Facts: November 23, 1907, the Bank of Wayland made an assignment for the benefit of creditors, and receivers were appointed. Certain stockholders file petitions alleging that they were induced to subscribe for stock through fraudulent representations, and asking for rescission of the stock subscription.

Point Involved: Whether a stockholder can be relieved of his liability as a stockholder on the ground of fraud, where since his subscription the rights of creditors have intervened and the corporation has become insolvent.

LUMPKIN, J., delivered the opinion of the Court: “In England it is settled that after the commencement of winding up proceedings against a corporation, an application to be relieved from liability as a shareholder on the ground of fraud practiced on him by agents of the company in procuring the subscription comes too late. * * *

“* * * A stockholder occupies a three-fold relation: First, to the corporation itself; second, to other stockholders; and, third, to creditors of the corporation. Fraud does not render a contract absolutely void, but voidable. It remains valid until repudiated or avoided. As between a stockholder and the corporation, unless special circumstances alter the case, the general rule that contracts obtained by fraud may be avoided by the party defrauded applies to a stock subscription induced by the fraud of the company through its authorized agents. So, also, where only the rights of other shareholders are affected, the company being solvent and ‘a going concern.’ * * * But where the rights of creditors are involved, the question is one of greater difficulty. Some American decisions have announced in general terms the rule laid down by the English courts; but in most of them additional circumstances existed, such as receiving benefits after knowledge or notice of the fraud, acts done, after notice or knowledge, inconsistent with a disaffirmance, laches, estoppel, the intervening of rights of innocent third parties, or the like. Thus, in *Chubb v. Upton*, 95 U. S. 665, 667, 24 L. Ed. 523, 524, Mr. Justice Hunt said: ‘It has been several times adjudged in this court that in an action by such assignee to recover unpaid subscriptions upon stock in such an organization, the defense of false and fraudulent representations inducing such subscription cannot be set up, especially when the subscriber has not been vigilant in discovering such fraud, and in repudiating his contract.’ It cannot be easily determined just how far a rule laid down in general terms would be applied in the absence of the facts added to it under an ‘especially.’ In the case just cited, Chubb was sued by an assignee in bankruptcy of the company. He sought to set up irregularities and informalities in the increase of capital stock to which he became a subscriber, and also fraud in the procurement of his subscription. It appeared that he was president of a branch of the company, took part in its meetings, paid money on his stock,

and at one time gave a proxy to another person to attend and vote at a stockholders' meeting at the main office. He made no effort to cancel his subscription. The company incurred liabilities and was adjudicated a bankrupt about fifteen months after his subscription. Clearly he should not have been relieved. In *Upton v. Tribilcock*, 91 U. S. 45; 23 L. Ed. 203, the shareholder had delayed repudiating his subscription for three years and, until an assignee in bankruptcy had been appointed, and there were other circumstances showing laches. Discussions of the subject will be found in 2 *Thomp. Corp. Secs.* 1440, 1449; *Upton v. Englehart*, 3 Dill. 496, Fed. Cas. No. 16,800; *Farrar v. Walker*, 3 Dill. 506, Fed. Cas. No. 4,679 (reported unofficially); *Newton Nat. Bank v. Newbegin*, 33 L. R. A. 727, and note (20 C. C. A. 339, 40 U. S. App. 1, 74 Fed. 135); *Parker v. Thomas*, 19 Ind. 213, 81 Am. Dec. 385, 401, note. A number of American decisions are to the effect that where one subscribes to stock and the company proceeds to do business, incurs liabilities, and later fails and is adjudged a bankrupt, or its assets are placed in the hands of a receiver for the purpose of winding it up, no rescission will be allowed, unless under exceptional circumstances. *Thomp. Corp. Sec.* 1450. * * *

"When a person becomes a stockholder of a corporation, he becomes a part of it. Its agents are, in a sense, his agents. They go out and deal with the public. If through their dealings debts are incurred, assuming both the stockholder and the creditor to be innocent and that one must suffer, the former, who put it in the power of the agents to do the wrong, should suffer rather than third parties who dealt with such agents. *Civ. Code*, 1895, Sec. 3940. As to creditors whose claims arose after the stockholders became such, their rights are superior to any right of rescission. The status of a stockholder relative to creditors who became such after he took the stock is not in all respects identical with that relative to antecedent creditors. As to creditors whose debts were created before he took the stock, questions of laches, acts

inconsistent with rescission, estoppel, etc., might arise. The new stockholder may have permitted the increase of indebtedness and the lessening of the assets with which to pay. * * * When the facts are shown, it can be made to appear whether a fraud was really perpetrated on each of the interveners; whether there was any lack of diligence in discovering such fraud, or unreasonable delay in seeking relief after its discovery, whether there was any active participation by the interveners in the management of the corporation, or whether debts had been incurred after the intervener became a stockholder, which either gave corporate creditors superior equitable rights or estopped the intervener from denying that he was a stockholder, and generally whether his conduct was such as to prevent relief."

Question 652: If the company becomes insolvent, does this intervene to prevent the creditor from setting up the fraud by which he was induced to subscribe? Why?

CHAPTER NINETY-FIVE

LIABILITY OF SHAREHOLDERS

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| § 489. Liability to corporation. | § 492. Payment as between corporation and shareholder. |
| § 490. The "trust fund doctrine." | |
| § 491. What constitutes payment for stock. | § 493. Forfeiture of stock for non-payment. |

Sec. 489. Liability to Corporation.

(Note: The liability to the corporation is governed by the contract of subscription. On the liability of a transferee of issued stock to pay the unpaid subscription thereon, see Case No. 657 and on the question whether the corporation can question the sufficiency of the payment which it has received from the stockholder, see Sec. No. 492, *post*, this chapter.)

Sec. 490. The "Trust Fund" Doctrine.

Case No. 653. Wood v. Dummer, 3 Mason (U. S. Cir. Ct.) 108.

Facts: Plaintiffs bring their bill in equity, as holders of banknotes of the Hollowell and Augusta Bank, against defendants as stockholders of the same bank for payment of such notes on the ground of a fraudulent division of the capital stock. The defendants denied the fraud, but admitted the division. It appeared that the bank divided three-fourths of its capital stock among its stockholders without providing funds to pay for its outstanding banknotes.

STORY, J.: " * * *

"It appears to me very clear upon general principles, as well as the legislative intention, that the capital stock

of banks is to be deemed a pledge or trust fund, for the payment of the debts contracted by the bank. The public, as well as the legislature, have always supposed this to be a fund appropriated for such purpose. The individual stockholders are not liable for the debts of the bank in their private capacities. The charter relieves them from personal responsibility and substitutes the capital stock in its stead. Credit is universally given to this fund by the public as the only means of repayment. During the existence of the corporation it is the sole property of the corporation and can be applied only to its charter, that is, as a fund for the payment of its debts, upon the security of which it may discount and circulate notes. Why, otherwise, is any capital stock required by our charters? If the stock may, the next day after it is paid in, be withdrawn by the stockholders without payment of the debts of the corporation, why is its amount so studiously provided for and its payment by the stockholders so diligently required? To me this point appears so plain upon principles of law, as well as common sense, that I cannot be brought into any doubt that the charters of our banks make the capital stock a trust fund for the payment of all the debts of the corporation. * * *

Question 653: What is the "trust fund" doctrine as announced by this case?

Case No. 654. Bedford R. R. Co. v. Bowser, 48 Pa. St. 29.

Facts: Suit by the company to enforce Bowser's subscription. Defense, among other things, that the board of directors released and cancelled the subscription.

Point Involved: Whether the board of directors have power to release a subscriber and thus impair the capital of the company.

STRONG, J.: " * * * The directors of the company then in office were its agents with limited powers, the extent of which the defendant was bound to know. Their

duties were to conduct its affairs to the furtherance of the ends for which the company was created. They had no power to destroy it, to give away its funds, or to deprive it of any of its means to accomplish the full purpose for which it was chartered. The creditors were not the only persons who had interests and rights at stake. The stockholders who had paid their subscriptions, or bought their stock, and the commonwealth by whom the charter had been granted, were at least equally interested. The railroad was unfinished, and the commonwealth had a right to demand that all resources, rights and credits of the company should be devoted to its completion. * * * Directors of a railroad company are trustees for all stockholders, and in a very just sense for the commonwealth. It is an abuse of their trust, wholly unauthorized, and at war with the design of the charter to single out some of the stock subscribers and release them from their liability.

* * * * *

Question 654: A corporation adopted a by-law that any member could, on giving 30 days' notice, withdraw, and F, a stockholder, withdrew in accordance with this by-law and with the assent of the officers. The corporation was then solvent. Afterwards becoming insolvent, a receiver was appointed and he sued F. Could he recover? (Farnsworth, Receiver, v. Robins, 36 Minn. 369.)

Case No. 655. Edwards v. Schillinger, 245 Ill. 231.

Facts: "The defendant in error, John B. Edwards, trustee in bankruptcy of Schillinger Bros. Asphalt Company, a corporation, filed his bill in the Superior Court of Cook County against the plaintiffs in error, Gustav A. Schillinger, and A. C. Gumbiner, stockholders of the corporation, to set aside a dividend, declared by the directors in fraud of creditors and applied by the stockholders in payment of unpaid balances of their subscriptions to the capital stock, and to compel plaintiffs in error to pay the amount of their subscriptions represented by the fraudulent dividend certificates. * * *

At a meeting of the board of directors held in the City of St. Louis, Missouri, on April 28, 1902, when the corporation was wholly insolvent and unable to pay any dividend whatever upon its stock, the directors, for the purpose of relieving the stockholders from liability for the unpaid portion of the stock held by them, pretended to declare a dividend of \$8,920.65, and authorized the secretary to issue dividend certificates [to the stockholders and to issue to them certificates of fully paid stock].”

Point Involved: Whether a stockholder can be relieved as to creditors of his liability upon his subscription by a declaration of dividends made while the corporation is insolvent and applied in payment of the stockholder's liability.

MR. JUSTICE CARTWRIGHT: “* * * A contract of a corporation limiting the liability of its stockholders to a portion of the par value of their stock is void both as to creditors and the assignee in bankruptcy. * * *”

Question 655: What was the scheme in this case to release the stockholder's liability? Was it effective? Why?

Sec. 491. What Constitutes Payment for Stock.

Case No. 656. N. T. W. Co. v. Gilfillan, 124 N. Y. 302.

Facts: Suit by a judgment creditor of a corporation to recover from defendant as a stockholder of such corporation, pursuant to a statute, upon the ground that the capital stock had not been paid in either in cash, or in property fairly worth the par value of the stock issued. Further facts in the opinion.

Point Involved: Whether stock is to be considered as paid up so far as creditors are concerned when it has been issued in exchange for property knowingly or fraudulently overvalued by the corporation.

VANN, J.: “The substantial issue in this section was whether the property procured in exchange for stock

was purchased at an over-valuation, not through error of judgment, but in bad faith and to evade the statute (Douglass v. Ireland, 73 N. Y. 100, 104.)

“The trial judge instructed the jury that if they found that the stock issued exceeded in amount the value of the property taken in exchange for it and for which it was issued, and that the trustees deliberately and with knowledge of the real value of the property over-valued it and paid in stock for it an amount which they knew was in excess of its actual value, they must find for the plaintiff. If the jury do not find this to be the fact, then they will find for the defendant.

“The jury found a general verdict for the plaintiff, and, as a special verdict, that the property purchased at \$300,000 was really worth but \$75,000.

“The evidence in support of the verdict is sufficient, if not overwhelming.

“The company was organized September 18, 1884, with a capital stock of \$300,000, divided into 600 shares of \$500 each. Within less than a year thereafter it was hopelessly insolvent, with all its property levied upon under an execution issued on a judgment recovered by the defendant, its president and a trustee from the outset. None of the stock was paid for in cash or otherwise than by the transfer of a lot of unpatented inventions of one Bliven. Two corporations had been previously organized, with the defendant as a trustee in each, to handle these inventions, one of which seems to have been merely a corporation on paper that ‘had no existence in fact to amount to anything,’ while the other was ‘a disastrous speculation.’

“The inventions were purchased by the corporation, whose transactions are directly involved in this action, substantially in the following manner, viz.: Bliven assigned them to the defendant, who, as trustee, transferred them to the company in consideration of the entire capital stock, to be held by him in trust as follows, to-wit: 200 shares for the benefit of the company itself; 100 shares, par value \$50,000, for the defendant—(in

payment of a debt of \$15,000 owing him by Bliven); 10 shares, par value \$5,000, for one Baxter (in payment of an old debt of Bliven to him of \$2,500); 27 shares apparently given away to qualify persons as trustees and to induce them to act; the remainder to Bliven or for his benefit.

“According to the evidence, the jury made a liberal estimate of the real value of the inventions when they found that they were worth \$75,000. The good faith of the trustees, including the defendant, as one of the most active in the transaction of this business, may be inferred from the foregoing facts. If they honestly considered the inventions worth \$300,000, why was one-third of the avails, \$100,000 in stock, donated to the company by Bliven? Why did the defendant accept of \$50,000 in stock in payment of a debt of \$15,000? Why was \$5,000 given to Dexter to pay \$2,500? Why was \$13,500 in stock given to persons to induce them to become trustees? Would \$300,000 in money have been disposed of in this way? The arrangement to thus dispose of the stock was made before the purchase and became a part of it. The facts were all known to the trustees, including the defendant. They were apparently intelligent men, the defendant being a physician. Although they testified that they considered the inventions worth \$300,000 or more, the surrounding circumstances permitted the jury to find, as the General Term said, that they ‘were not only worth less than the price agreed to be paid for them, but it was so understood by the defendant and the other parties to the transactions.’ From these and other significant facts, not recited, it is evident that a case was presented for the consideration of the jury, and that the motions to dismiss were properly denied.

“The merits are with the plaintiff, and when that is the case the exceptions should be overruled, unless a material and manifest error of law has been committed.”

Question 656: (1.) By what means was payment made in this case? Did the Court hold that such payments were sufficient to constitute payments as against creditors?

(2.) A company was organized with an authorized capital stock of \$500,000. This stock was fully paid up with \$2 cash and a breakfast food formula appraised at \$499,998. The corporation becomes insolvent. The trustee in bankruptcy sues the stockholders. Can he recover? (*Wood v. Sloman*, 114 N. W. (Mich.) 317.)

Case No. 657. *Gillett v. C. T. & T. Co.*, 230 Ill. 373.

MR. JUSTICE SCOTT delivered the opinion of the court:

“First—It is contended by appellants that in accepting certain property in payment of MacKaye’s subscription to the capital stock of the Columbian Celebration Company to the amount of \$1,999,600, the directors fixed that value upon the property offered in the fair and honest exercise of their judgment as to its worth, and that the stock must therefore be regarded as fully paid and non-assessable, even if the directors erred in their judgment as to its value.

“When the board of directors met on May 16, 1892, the principal asset of the corporation was MacKaye’s subscription for stock to the amount above mentioned. The law required the directors, in collecting that subscription, to obtain from MacKaye ‘money or money’s worth’ to the full amount of the subscription. (*Coleman v. Howe*, 154 Ill. 458; *Garden City Sand Co. v. Crematory Co.*, 205 id. 42.) ‘Money or money’s worth’ means cash or its equivalent. If the directors saw fit to accept property in lieu of cash they could only take it at its fair cash market value, if it was property which had an ascertainable market value. If it had no ascertainable market value, then the only price at which the directors could purchase it was such price as could be realized by selling it to others for cash.

“On the date last mentioned the directors of the corporation entered into a contract with MacKaye, by which, in satisfaction of his liability on his subscription, Mac-

Kaye transferred to the corporation the sole and exclusive right to use eleven alleged new, useful and valuable improvements in scenic art; also the right to use and produce a 'spectatorio' or play, entitled 'The Great Discovery,' of which it is said MacKaye was the author, in the States of Illinois, Indiana, Michigan, Minnesota, Iowa and Missouri, for a period of fifteen years, burdened with a ten per cent royalty reserved to MacKaye. At the time the contract was made no application had been made for a patent on any of the inventions. The description of the inventions contained in the contract is very general in character. With one or two exceptions the descriptions are not such as would enable the reader to identify the invention. They consist usually of the name given by MacKaye to the invention, followed by a statement of the object of the invention. The play, 'The Great Discovery,' had not been written. At the time MacKaye's subscription was so satisfied the directors were MacKaye, Butterworth, Crosley, White and Edmonds. Crosley did not attend the meeting of May 16, 1892, and MacKaye did not vote upon the proposition in reference to the payment of his subscription by the transfer of the rights above enumerated. Those who voted in favor of accepting the proposition were Butterworth, White and Edmonds. Butterworth was a co-promoter with MacKaye, and a few days later, in accordance with an arrangement effected prior to May 16, 1892, received from MacKaye a considerable portion of the stock subscribed for by the latter. Edmonds was an assistant to Butterworth, as secretary of the World's Columbian Exposition. White was a clerk in the employ of MacKaye and Butterworth, doing clerical work in connection with the promotion of MacKaye's scheme. So far as the transaction of business affecting the corporation was concerned, White and Edmonds were wholly dominated by MacKaye and Butterworth. Edmonds testified that he 'never formed any intelligent conclusion as to the value of the patents,' referring to the inventions the right to use which was transferred by

the contract; and further: 'I did not consider it (the MacKaye proposition which was accepted) in the sense that I was going to put a lot of money in it myself, but I honestly believed on May 16, 1892, that the resolution was for the best interests of the company and was a good proposition for it.' White says: 'I don't remember making any inquiry, as a member of the board of directors or an officer, into the merits of these inventions.'

"It will no doubt be agreed that the rights transferred to the corporation by the contract were without market value. It was then the duty of the directors, before accepting the rights transferred by this contract in payment of this large subscription, to ascertain whether those rights had value, and if so, what the value was. The natural and reasonable method to be pursued in determining that question would have been to have applied to men not interested in the promotion of MacKaye's scheme, who were of wide experience in the production of great spectacular plays, for their views in reference to the worth of the rights which MacKaye proposed to transfer. No such investigation was made. No other steps were taken to ascertain the value of the rights MacKaye proposed to transfer, such as would have been taken by directors seeking to deal honestly and fairly with the assets of the corporation. It was the duty of these directors to ascertain the value of these rights precisely as they would have done had they intended to invest money in such rights themselves, and that they did not do. It is no doubt true that if the directors, in the fair, honest and intelligent exercise of their judgment, make a mistake and accept property at a price greater than its real value, such cannot be regarded as a fraudulent over-valuation of the property; but that rule only applies where the transaction constitutes a valid contract of bargain and sale, made in good faith on the part of the directors and in the intelligent exercise of the fair and honest judgment on their part. There was no such transaction here. The trans-

fer to the corporation was a mere sham. It was, in fact, a sale by MacKaye to MacKaye, and was, in law, a fraud.

* * * It follows that MacKaye's stock subscription remained wholly unpaid.

“Second—The certificates for MacKaye's stock recited that the shares were ‘fully paid and non-assessable,’ and the law is, that where stock is so issued and the holder thereafter sells or assigns the same, and the assignee acquires it in good faith and without notice that it has not been fully paid, he cannot be made liable if, in fact, the stock is not fully paid. (Coleman v. Howe, *supra*; Sprague v. National Bank of America, 172 Ill. 149.) Appellants insist that, even if this stock was wholly unpaid, they acquired it in good faith without notice of that fact, and are therefore not liable. ‘Notice,’ in this connection, must be given the ordinary signification of that term, and means knowledge that the stock was unpaid, or knowledge of such facts as would have put an ordinarily prudent man upon inquiry, when the inquiry might reasonably be expected to have led him to knowledge that the stock was unpaid. (Russell v. Ranson, 76 Ill. 167.) Many of the appellants knew precisely how MacKaye had paid for his stock, and all of the appellants acquired their stock, as they knew, within a few months after the organization of this corporation. They obtained it without giving any valuable consideration therefor, except in a few instances where it is claimed that a small percentage of the face value of the stock was paid therefor by services rendered or by other methods, not including cash actually paid at the time of the transfer of the stock. The fact that the corporation had just been organized, and that its stock was being transferred without, or practically without, any valuable consideration, was, we think sufficient to put a reasonably prudent man upon inquiry, and that inquiry would, in our judgment, have led to knowledge of the fact that the stock was wholly unpaid.”

Question 657: (1.) What, according to this case, constitutes a *bona fide* valuation by directors?

(2.) When will a transferee of stock be deemed to have notice that the stock is unpaid? Does the recital in the certificates help him?

Case No. 658. First National Bank of Deadwood v. Gustin Co. et al., — Minn. —, 61 L. R. A. 676.

Facts: Suit by the bank against the Gustin Company and the other defendants to compel payment of a debt to the bank by enforcement of stockholder's liability. The stock was issued partly at one-tenth of its par value, and partly for nothing. The bank knew this when it loaned the money which represents the present debt.

Point Involved: Whether a creditor can enforce stockholder's liability when he knew at the time he became a creditor of the arrangement between the corporation and the stockholder by which the stockholder was to have no further liability to the company.

MITCHELL, J.: “* * *

“While the courts have not always had occasion to state the limitations upon the doctrine that ‘the capital is a trust fund for the benefit of creditors,’ yet we think that it will be found that in every case where they have impressed a trust upon the subscription of the shareholders it has been in favor of creditors becoming such afterwards, and hence fairly to be presumed as relying upon the amount of capital which the company was represented as having. We are referred to none, and have found none, where any such trust has been enforced in favor of creditors who have dealt with the corporation with full knowledge of the facts. The reason is apparent, for in such cases no fraud, actual or constructive, has been committed on such creditors.

“If a corporation issued new shares after the claim of a creditor arose, it is clear that the latter could not have dealt with the company on the faith of any capital represented by them. Whatever was contributed as capital in respect of the new shares was a clear gain to the creditor's security. So, too, if a party deals with a corporation with full knowledge of the fact that its nomi-

nal paid-up capital has not in fact been paid for in money or property to the full amount of its par value, he deals solely on the faith of what has been actually paid in, and has no equitable right to insist on the contribution of a greater amount of capital by the shareholders than the corporation itself could claim as part of its assets. *Coit v. North Carolina Gold Amalgamating Co.*, 14 Fed. Rep. 12, S. C. 119 U. S. 343 (30 L. ed. 4201).''

Question 658: State the doctrine of this case.

(Note: This doctrine is not universally assented to. In some states, the knowledge of the creditor is immaterial. He can in any event enforce the stockholder's liability to pay in full either in money or money's worth.)

Sec. 492. Payment as Between Corporation and Shareholder.

(Note: What is agreed upon between the parties as payment will constitute payment as between them, in the absence of fraud on the other stockholders.)

Sec. 493. Forfeiture of Stock for Non-Payment.

(Note: By the statutes of many states corporate stock may be forfeited for non-payment. In such a case the stock is re-sold and in case of any deficiency the stockholder is liable therefor. In case of surplus, after paying expenses, the same is turned over to the stockholder.)

CHAPTER NINETY-SIX

TRANSFER OF SHARES; SPURIOUS STOCK

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| § 494. Transferability of corporate stock; how accomplished. | § 497. Liability of transferee to creditors. |
| § 495. Lien of corporation on shares. | § 498. Liability of transferor to transferee. |
| § 496. Liability of transferee to corporation. | § 499. Lost, stolen and forged certificates; transfer of. |

Sec. 494. Transferability of Corporate Stock; How Accomplished.

Case No. 659. Ernst v. Elmira Municipal Improvement Co., 54 N. Y. Sup. 116.

Facts: Suit brought by owners of certain of the capital stock of Elmira Municipal Improvement Company to enjoin the issue of certain preferred stock by it to certain stockholders and to compel the company to recognize and register a transfer of stock to the complainants, purchased by them from registered stockholders. The complaint alleges that the corporation has no power to issue preferred shares against the dissent of common stockholders.

Points Involved: The right of one acquiring stock from a shareholder to compel the company to recognize the transfer on its books, the right of such a one whom the company has refused to recognize to be considered a stockholder in fact; whether a corporation which has issued common stock can afterwards issue preferred stock without the unanimous consent of all the stockholders.

LAUGHLIN, J.: “* * * The demurring defendants contend that the plaintiffs’ only remedy is an action at law to recover the value of the stock as damages for the wrongful refusal to transfer the stock on the books of the company and to issue new stock to the plaintiffs. It is argued that the corporation owes no duty to the transferee of stock and that there is no privity between him and the company until he has become a stockholder on its books. I cannot agree with the contention. * * * It has long since been settled that an equitable action may be maintained by a transferee of stock to compel the company to transfer the stocks upon its books, and that a wrongful refusal to transfer amounts to a waiver of the statutory requirement and the corporation will not be permitted to take advantage of its own wrong, but the transfer will be deemed complete, and the company will be bound to recognize it, precisely as if the entries had been made upon the company’s books. * * * The plaintiffs are * * * entitled to have the transfer entered on the books of the company and to have new certificates of stock issued to them in their own names, to the end that they may stand in the unquestionable position for the assertion and protection of their rights and interests in the corporation, whatever such rights and interests may be. * * *

“* * * In the absence of a statutory provision of law reserving such power, there can be no issue of preferred stock in a corporation to the prejudice and injury of the owners of the common capital stock without their unanimous consent. Each stockholder has a vested individual right in his proportionate share of the corporate property and of the profits of the business. Such action cannot be impaired by the action of the directors, or of any majority of the stockholders without his consent. * * * It is well settled by authority that a suit in equity will lie by a holder of common stock to enjoin any unlawful or unauthorized issue of preferred stock. * * *

Question 659: Answer the questions suggested in the "Points Involved" in this case.

Case No. 660. *Brisbane v. D. L. & W. R. Co.*, 32 N. Y. Supreme, 438.

Appeal from a judgment, entered upon the trial of this action at the Special Term.

The plaintiff brought this action to compel the defendant to issue to him a certificate for ten of its shares to which he claimed to be entitled as the transferee of ten shares of the stock issued by a corporation to whose rights and obligations the defendant is shown to have since succeeded, or in case of the inability of the defendant to issue such certificate for damages to the extent of the value of such stock. This certificate, of which the plaintiff was the transferee, was a certificate issued to Samuel Benedict, and it contained the statement that he was entitled to ten shares of the capital stock of the corporation issuing it, transferable only on the books of the company upon surrender of the certificate. Benedict executed a power of attorney, indorsed upon the certificate, appointing the plaintiff his attorney irrevocable to sell and transfer to the plaintiff the whole or any part of the shares specified. This power was given on the 1st day of January, 1856, but no transfer of the shares was made under its authority during the lifetime of Benedict. After his decease and in the year 1876 his administrator procured a transfer of these shares upon the books of the defendant to himself. The certificate issued for the shares themselves was not and could not be by him produced, and according to its terms he was not entitled to the transfer of the shares which he caused to be made, and the defendant it was claimed made it without authority. It was for that reason held that the defendant was liable to that extent to the plaintiff in this action.

In the intermediate time a stock dividend of fifty per cent had been declared in favor of these shares, and further dividends in cash had also been specifically cred-

ited to them on the books of the defendant. This stock dividend and the cash dividends, with the exception of one of them, were credited to Benedict, who appeared on the corporate books to be the owner of these shares, and they were accordingly paid over to his administrator at or about the time of the transfer of the shares themselves. The plaintiff insisted upon his right to recover the value of the stock dividend and the amount of the cash dividends paid to the administrator, but these portions of his claim were rejected as not well founded by the decision finally made in the action.

The court at General Term said: "His title to the dividends rests upon a different basis from that of his right to the shares themselves, for those shares could not lawfully be transferred without the surrender of the certificate which had been issued to authenticate the right of the person named in it to them. But as long as the books of the company contained evidence that the person who received the certificate was still to be regarded as the owner of the shares it had an authentic record upon which it could lawfully act, and that determined the disposition which should be made of the dividends. Benedict stood upon the books of the company as owner of the shares. Nothing appeared to impeach his title; and as they were only transferable upon the surrender of the certificate, as long as that had not been done, no other alternative existed than to regard him as still the owner of the shares. To obtain the dividends upon the shares he was not bound to produce the certificate which had been issued for the stock, but he could do so upon the fact of his recorded title as long as no evidence appeared from which his right could be impeached or questioned. Payment to him under such circumstances would be a lawful and proper disposition of the dividends. This was the view which was taken of the subject in *Smith v. American Coal Company* (7 Lans. 317), and it is sustained by what was said upon the same subject in *McNeil v. Tenth National Bank* (46 N. Y. 325). And it was also considered to be a settled principle of

law in *Manning v. Quicksilver Mining Company*, decided by the court in March, 1881. (24 Hun, 360.)

“When Benedict died this right, as it appeared to exist in him, passed to his administrator, who by virtue of that relation, acquired the same title to the dividends that Benedict could have asserted in case he had lived. A payment to him was authorized by the evidence of title standing upon the books of the corporation, and his failure at the time it was claimed to present the certificate issued for the shares was not a circumstance subjecting his title to suspicion, or justly rendering it a subject of inquiry.

“If notice had been given by the plaintiff of his right to receive the dividends accruing upon the shares, the case would undoubtedly require a different determination.”

Question 660: Why was the defendant corporation held to be liable to the plaintiff for issuing shares to the administrator and not liable for having paid the dividends on such shares to such administrator? Do you think the plaintiff could recover in a suit against such executor for the dividends received by or credited to him?

Sec. 495. Lien of Corporation on Shares.

Case No. 661. *Dempster Mfg. Co. v. Downs and Mullen*, 126 Ia. 80.

Facts: Suit by the corporation against Downs on a note and account and to have the amount found due enforced as a lien against Down's stock in the corporation. The stock had been assigned by Downs to Mullen as security for some loans and Mullen resists the establishment of a lien in favor of the corporation, to the detriment of his security, and prays that the officers of the corporation be compelled to transfer the stock on the books of the company. Mullen was ignorant of any lien reserved by the company on Down's stock and there was no notice of such lien in the certificates held by Downs and pledged to Mullen. The company claims the lien by

virtue of a provision establishing a lien of unpaid stock in its charter. The certificates pledged recited that the stock was full paid and non-assessable, and transferable only on the books of the company.

Point Involved: Whether a transferee for value and without notice, of shares upon which a corporation holds a lien by virtue of its charter, takes the stock subject to such lien.

LADD, J.: “* * * At common law a corporation had no lien upon the shares of its stockholders for debts due from them to the company. Secret liens, as they impede the safe and speedy transfer of property, are always discouraged; and courts uniformly refuse to enforce the same, as against stock, unless created by statute, charter or by law of the company. * * * Corporations are formed in this state by the adoption of articles of incorporation in pursuance of the general laws enacted by the legislature, and such articles in connection with the statutes answer the same purpose as a special charter. They contain the terms of agreement between the company and its stockholders, and indicate the business to be transacted. * * * By accepting the stock in the corporation every stockholder assents to the terms and conditions found in the articles. Such lien is not prohibited and may be created by the articles of incorporation. * * * Whether they may be accomplished by the enactment of a by-law is a controverted question, concerning which the authorities are in sharp conflict * * *”

Question 661: (1.) Did a corporation at common law have a lien on the stock of the stockholders?

(2.) What three ways are stated by the Court in which a lien may be given?

(3.) If a lien is conferred by *by-law*, does a transferee for value and who has no notice of the lien, take subject to such lien?

(4.) If a lien is reserved in the charter, does such a purchaser take subject to such a lien?

(5.) If the certificate recited that the stock represented by

the certificate was "fully paid and non-assessable," do you think that a general lien reserved by the charter on unpaid stock, would be asserted against a purchaser of such stock?

(Note: The recital in the certificates that the stock was fully paid and non-assessable, would seem in all justice to prevent the corporation from asserting its lien. Surely, inasmuch as stock certificates are so commonly transferred on the market, there ought to be no question as to the right of a transferee, for value, to take a clear title irrespective of the state of accounts between the transferror and the corporation.)

Sec. 496. Liability of Transferee to Corporation.

(Note: The transferee is liable to the corporation if he knows the shares are not paid up. If the shares recite they are fully paid, a transferee may rely thereon.)

Sec. 497. Liability of Transferee to Creditors.

Case No. 662. French v. Harding, 235 Pa. St. 79.

Facts: A proceeding was brought in the New Jersey courts to establish the insolvency of the Agnew Company, collect its assets, enforce stockholders' liability on unpaid stock so far as the indebtedness of the company should require, pay off its creditors and wind up its business. French was appointed receiver and brings suit in the Pennsylvania court to enforce Harding's liability as shareholder, the stock held by him having never been paid for. Harding defends that he is not an original subscriber, but a purchaser from a shareholder of stock already issued; that he bought the stock in the market through a broker at Philadelphia, and had no knowledge said stock was unpaid.

Point Involved: Whether a transferee of issued stock, who does not know that it is unpaid, can be held for the benefit of the creditors of the corporation.

HEAD, J.: " * * *

"(1.) From Cook on Corporations, Vol. 1, Sec. 50, where may be found a general discussion of this question,

supported by many notes and citations, we quote the following: 'A *bona fide* purchaser, for value and without notice, of stock issued by a corporation as paid up, cannot be held liable on such stock in any way, either to the corporation, corporate creditors or other persons, even though the stock was not actually paid up as represented. * * * The law goes still further and holds that where a person in open market, in good faith and without notice, purchases certificates, such stock is to be deemed "paid up" in his hands, and he is protected as a *bona fide* purchaser, even though there is nothing on the face of the certificates stating that they are paid up. This can now be laid down as the established rule. It is based on sound public policy, favoring as it does the transfer of personal property and the quasi-negotiability of stock and discountenancing secret liens and constructive notice.' * * * "

Question 662: State the rule of this case.

Case No. 663. Edwards v. Schillinger, 230 Ill. 373.
(Set out as Case No. 655, *supra*.)

Question 663: Was the transferee held in this case? Why?

Sec. 498. Liability of Transferror to Transferee.

Case No. 664. Burwash v. Ballou, 230 Ill. 34.

MR. CHIEF JUSTICE HAND: " * * *

"The International Copper and Gold Company was a *de facto* corporation, and the appellant having purchased its stock of the appellees, in a proceeding like this, no warranty having been made by the appellees that the corporation issuing such stock was a *de jure* corporation, the appellant cannot escape the payment of the consideration agreed to be paid by him for such stock, by showing that the International Copper and Gold Company, which issued said stock, was not legally organized, or that its

increase of stock of which that purchased by appellant formed a part, was illegally issued. (Marshall v. Keach, 227 Ill. 35.) In Higgins v. Illinois Trust & Savings Bank, 193 Ill. 394, it was held that the vendor of stock in a corporation impliedly warrants that the stock is genuine and that he is the owner thereof and authorized to transfer title, and that if the assignee desires further protection he must exact a special warranty. See also First Nat. Bank of Sterling v. Drew, 191 Ill. 186."

Question 664: What are the implied warranties of a seller of corporate stock?

Sec. 499. Shares Transferred Without Authority; Lost, Stolen and Forged Certificates.

Case No. 665. Jarvis v. Manhattan Beach Co., 148 N. Y. 652.

Facts: Defendant, The Manhattan Beach Co., had a capital stock of \$5,000,000 divided into \$50,000 shares of \$100 each. A large portion of the stock was issued and the certificates listed on the N. Y. Stock Exchange, and were subject to purchase and sale by the public. The certificates were signed by the President and Assistant Treasurer, and in order to guard against fraud countersigned and registered by the Central Trust Co., which acted as registrar of transfers in order to authenticate the genuineness of the certificates. The Manhattan Beach Co. had an office in New York City where the transfers of its stock were made, and a transfer clerk was employed there. September 30, 1882, this transfer clerk delivered to a firm of brokers in New York, in the ordinary course of business, a certificate for 100 shares of the stock of the Manhattan Beach Co. to be sold on account. This certificate bore the genuine signatures of defendant's president and assistant treasurer, and was countersigned by Central Trust Company with certificate registration. It certified that one B. Bignell was owner of 100 shares of the capital stock of Manhattan Beach Co., and the

name of B. Bignell was indorsed under the blank form of transfer and this signature purported to be witnessed by the transfer clerk. This certificate was, in fact, spurious, fabricated by the transfer clerk over the genuine signatures of the officers, upon blanks used for issuing genuine certificates. Bignell was not owner of any stock and did not sign the form of transfer. By the rules of the stock exchange certificates sold there must either stand in the name of some member and be indorsed in blank by him, or else must be guaranteed by a member of the exchange. The brokers who sold this certificate were therefore obliged to guarantee that it was genuine. To find out whether it was genuine they sent it by messenger to Central Trust Co. and then to the transfer office and were informed it was properly registered and at the defendant's office that it was all right. They then sold it and remitted the proceeds to the transfer clerk, less commissions. About two years later they were obliged to make the stock good, and this is a suit by Jarvis, who represents the brokers as their assignee to recover the loss thus sustained by the brokers. In 1884 the transfer clerk absconded and it was found he had issued many fraudulent certificates. He had charge of the stock ledger and transfer books, and no supervision had been kept over him or examination made of his books.

O'BRIEN, J.: (After stating the facts, substantially as above.)

“ * * *

“The principles upon which a corporation may be held liable to a *bona fide* holder of certificates of stock, fraudulently issued or put in circulation by the wrongful or criminal acts of its officers or agents, are quite well settled. Numerous cases involving these questions have received the attention of this Court and quite recently some new features of such transactions have appeared. (N. Y. & N. H. R. R. Co. v. Schuyler, 34 N. Y. 30; Fifth Avenue Bank v. Forty-second Street, etc., R. R. Co.,

137 N. Y. 231; *Manhattan Life Ins. Co. v. Forty-second Street, etc., R. R. Co.*, 139 N. Y. 146; *Knox v. Eden Musee, etc., Assn.*, 148 N. Y. 441.)

“The liability in such cases is determined by an application of the general rules of law that govern the relations of principal and agent as developed and applied to corporations, acting solely through such agencies. The principal is liable to a third person in a civil action for the fraud or other malfeasance of his agent, perpetrated by the latter in the course of his employment, although the principal did not authorize, justify or know of the misconduct. In this case the certificate contained the genuine signatures of three authorized officers or agents of the defendant, namely the president, the assistant treasurer and the registrar. The paper upon its face was an assurance to the public, through the acts of its officers, that a person named therein, whether a real or fictitious person, was the owner of one hundred shares of its capital stock. It had upon its face all the essential evidence of genuineness, and it was presented to the brokers for sale, apparently in proper form for transfer, by the very agent of the defendant, that it had held out to the public as the person who had the power to represent and act for it in making such transfer. When the paper was delivered to the brokers by the transfer clerk, having indorsed thereon what appeared to be a regular transfer, it is difficult to see why it was not received by them with every reasonable assurance that the defendant was able to give, that the certificate was not only genuine stock, but in a condition to be transferred upon the books in favor of any one who should receive it in good faith. The paper in fact, however, was nothing but a fictitious and fraudulent device on the part of the transfer agent which he had fabricated for purposes of his own, and although the evidence tended to show that his frauds in this respect could have been detected or prevented by the exercise of reasonable diligence on the part of the defendant’s officers, yet, as the brokers knew, or ought to have known, that he was dealing with himself in respect

to the certificate, it may very well be that this circumstance was sufficient to put them on their guard and to impose upon them the duty of making some inquiry as to its origin and validity. The paper came to them accredited by the genuine signatures of the proper officers of the defendant and countersigned by the registrar, whose duty it was to guard against unauthorized or fraudulent issues of the stock. These signatures carried with them, to strangers at least, the very highest assurance of the genuine character of the security. But we do not think it is necessary in this case to decide what the liability of the defendant would be in case it appeared that the brokers took the certificate without inquiry, since the proof tended to show that they were not negligent in that respect. This was really the only question of fact contested at the trial and submitted by the court to the jury. While such certificates do not possess all the qualities of commercial paper, they do possess some of them, and innocent parties dealing in them will be protected upon analogous principles and, in a proper case, will be entitled to compel recognition as stockholders, where power exists to issue new certificates or to indemnify if there was not."

Question 665: (1.) State briefly the facts of this case and the Court's decision.

(2.) If the transfer clerk had forged the names of the three officers, do you think the corporation would have been held?

Case No. 666. Chicago Edison Co. v. Fay, 164 Ill. 323.

Facts: Fay sues the Chicago Edison Co. to compel it to issue to him 200 shares of its capital stock in lieu of 200 shares of such stock, belonging to him, which upon forged assignments and without his authority had been surrendered up to the company and cancelled and new certificates issued to the assignees, who were innocent purchasers or pledgees.

The circumstances were that in June, 1894, Fay went to the seashore for the summer, leaving his office and busi-

ness affairs in Chicago in charge of Anderson, his private secretary, giving Anderson a power of attorney to draw and endorse checks and drafts on the Northern Trust Co. He also directed Anderson to pay the last installment on the Chicago Edison stock and receive and keep the same, and this stock was by Anderson afterwards paid for and delivered to Anderson made out to Fay. Fay had had previous dealings with Slaughter & Co., brokers and bankers, and they knew Anderson to be Fay's private secretary and man of affairs. Anderson sent one of the 100-share certificates to Slaughter & Co. for them to sell, forging Fay's name to the blank form of transfer. Slaughter & Co. took the certificate to the company and had it transferred on the books in two lots, one certificate for 50 shares being issued in the name of Slaughter & Co. and the other certificate being issued in the name of the purchaser to whom Slaughter & Co. had sold the same, and Slaughter & Co. then sent a check to Anderson made out to Fay for approximately \$12,000, representing the amount for which they sold the 50 shares and the amount advanced by them as a loan on the other 50 shares. Anderson, about two weeks later sent over the other 100-share certificate and procured a further loan of \$8,000, Fay's signature being forged to this certificate as to the other. This certificate was surrendered to the company and two certificates issued in its stead, one for 25 shares to the purchaser and one for 75 shares to Slaughter & Co. Anderson deposited to Fay's account all of the money so received, and then checked it out for his own use by authority of his power of attorney and then absconded. The Edison Company refuses to recognize Fay as a stockholder, and this is a bill to compel such recognition. The Court below entered a decree in Fay's favor.

Point Involved: Whether a stockholder can lose his rights as such through a forged transfer of his stock by another who is his agent for other purposes which forged transfer has been recognized by the company and a transfer made pursuant thereto on its books.

MR. JUSTICE CARTER: "The decree below was right
 * * * Appellant acted at its peril in cancelling Fay's
 certificates of stock and in issuing to others other certificates therefor on the forged assignments. Forgery can confer no rights or authority upon anybody. * * *"

(Note: See also *Fay v. Slaughter*, wherein on this same set of facts, *Slaughter & Co.* sued *Fay* for the money paid to the agent, and the Court held that they could not recover.)

Question 666: (1.) The M corporation issues a certificate of stock to A. A's name is forged by his agent B, to the blank power of attorney and form of transfer, and the certificate is then sold to C. Has C any right as a stockholder?

(2.) Same case. C takes the certificate to the company and it takes up and cancels the certificate and issues a new one in its stead, delivering the same to C, and C is put upon the books as a stockholder as transferee of A's stock. Is A deprived of his stock? Is C a stockholder or has he any rights against the company?

(3.) Same case. C takes the new certificate which certifies him as a stockholder and sells same to D. The original forgery by B is discovered and the company refuses to recognize D or give him any damages. D files a bill and asks for a decree establishing him as a stockholder, or in lieu thereof to give him damages. Has he any remedy?

Case No. 667. *Sarin v. Wilson*, — Cal. —, 13 L. R. A. 605.

Facts: Plaintiff is owner of a 100-share certificate of stock in a mining corporation issued to one H. B. Parsons and properly indorsed by him. An employee of plaintiff stole the certificate and delivered the same to the defendant as a broker to sell said stock for him. The defendant made the sale and turned over the proceeds to the thief. The defendant was ignorant of the theft and acted in good faith. He is now sued for his alleged conversion of defendant's property.

Point Involved: Whether a thief of stock certificates so indorsed as to pass by delivery can give a good title thereto to innocent purchasers.

DE HAVEN, J.: "To hold the defendant liable, under the circumstances disclosed here, may seem upon first impression to be a hardship upon him. But it is a matter of every-day experience that one cannot always be perfectly secure from loss in his dealings with others, and the defendant here is only in the position of a person who has trusted to the honesty of another, and has been deceived. He undertook to act as agent for one whom it now appears was a thief, and, relying upon his representations, he aided his principal to convert the plaintiff's property into money, and it is no greater hardship to require him to pay to the plaintiff the value of this property than it would be to take it away from the innocent vendee who purchased and paid for it. And yet it is universally held that the purchaser of stolen chattels, no matter how innocent or free from negligence in the matter, acquires no title to such property as against the owner, and this rule has been applied in this court to the innocent purchaser of shares of stock. *Barstow v. Savage Min. Co.*, 64 Cal. 388; *Sherwood v. Meadow Valley Min. Co.*, 50 Cal. 413 * * *"

Question 667: (1.) In what shape was this property when it was stolen, in respect to signatures?

(2.) If the owner of the certificate had placed it with a broker as collateral for a loan from the broker, and the certificate was indorsed in blank, so that it could be transferred by mere delivery, and the broker in violation of his right had sold to an innocent purchaser, do you think the owner would have been estopped to set up the fraud?

Case No. 668. *Otis, Adm'r, v. Gardner*, 105 Ill. 436.

Facts: Sheridan Wait, in his lifetime, was the owner of 100 shares of stock in Calumet & Chicago Canal & Dock Co., of par value of \$10,000 represented by certificates issued to him. Written on the back of each certificate was a blank assignment and power of attorney, that would authorize the assignee to have the stock represented by such certificates formally transferred to him on the books of the company. March 16, 1875, Wait in-

dorsed the certificates below the blank form of transfer and delivered them to Chauncey T. Bowen, and Bowen gave back a receipt reciting he had "borrowed" the stock and that it was to be returned on demand. The purpose of this loan did not appear. Afterwards Bowen wrongfully pledged these two certificates as collateral security for the payment of his notes to Jefferson Gardner, the defendant in this case. The blank form of transfer consisting in an assignment and a power of attorney. Otis, as administrator of Wait, filed this bill against Gardner and the corporation. The bill asked for a decree that the stock be declared to belong to Wait's estate; that the old certificate be cancelled, and a new certificate be issued to the administrator by the company, and that he be recognized as a stockholder on the books.

Point Involved: Whether placing in the hands of an agent, a stock certificate, so indorsed that it may be transferred by mere delivery, estops the true owner to set up his title against an innocent purchaser or pledgee for value of such certificate to whom such agent has without actual authority transferred it.

MR. CHIEF JUSTICE SCOTT: "The intestate placed the certificates in the hands of Chauncey T. Bowen, with a blank assignment written thereon, authorizing an absolute transfer of the stock to the assignee, under the by-laws of the company. * * * It was pledged to Gardner, in the usual course of business, as collateral security for the indebtedness of the holder, and was taken in good faith, without the slightest knowledge that any one other than the pledgor claimed or had any interest in the stock represented by the certificates. As has been seen, the certificates of stock were placed in the hands of Bowen by the intestate in such condition they could be readily sold or hypothecated by him, and if his assignee made an improper use of them, the assignor, if living, could get no relief against that which he deliberately authorized to be done, if it would affect injuriously an innocent purchaser for value, and his personal representa-

tive can have no relief that could not be granted on a like bill by the intestate, if living. The principle is, that when one of two or more persons must suffer loss, upon him whose conduct made it possible for loss to occur should the consequences ultimately rest."

Question 668: State what the Court holds in this case.

CHAPTER NINETY-SEVEN

VARIOUS RIGHTS OF STOCKHOLDERS IN GOING CONCERN

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| § 500. Stockholders' meetings; vote. | § 503. Right to inspect corporate |
| § 501. Dividends. | books and records. |
| § 502. Right to prevent <i>ultra vires</i> | § 504. Right to contract and deal |
| acts and to sue or defend in | with corporation. |
| behalf of corporation. | |

Sec. 500. Stockholders' Meetings; Vote.

Case No. 669. Warner v. Mower, et al., 11 Vermont Reports, 385.

Facts: Suit involving the title to property, plaintiff claiming, under a deed of assignment executed by the president of the company, and defendant claiming as creditor under attachments made against the company after such assignment. Defendant claims that the assignment by the president was void, because never properly authorized by the corporation. The facts were that the regular annual meeting, in accordance with the by-laws, was held April 5, 1837, the secretary having given a general notice to all stockholders, but not stating the business to be transacted; that the meeting was adjourned by the stockholders present till April 19, 1837, no further notice being given that at such adjourned meeting the vote in question was taken. Defendant contends that the vote was invalid to confer authority on the president because of the lack of any notice of the adjourned meeting, or if the notice of the original meeting was good for the adjourned meeting, then that it was insufficient

in its substance, namely, that it did not state the business to be performed.

REDFIELD, J.: “* * *

“The authority of the president to make such conveyance depends altogether upon the vote of the corporation, at their annual meeting in the year 1837, held by adjournment from the day fixed by the by-laws: It is too well settled to require comment, that all corporations, whether municipal or private, may transact any business at an adjourned meeting, which they could have done at the original meeting. It is but a continuation of the same meeting. Whether the meeting is continued without interruption for many days, or by adjournment from day to day, or from time to time, many days intervening, it is evident it must be considered the same meeting, without any loss or accumulation of powers. *Schoff v. Bloomfield*, 8 Vt. R. 472.

“It is to be borne in mind, too, that a manifest distinction obtains between general stated meetings of a corporation and special meetings. I know that stated meetings may, nevertheless, be special, *i. e.*, limited to particular business. But stated meetings of a corporation are usually general, *i. e.*, for the transaction of all business within the corporate powers. Unless the object of such meeting is restricted by express provision of the by-laws, it would ordinarily be understood to be general; and so every corporator would be bound to understand it. But if the object of the meeting be limited by the by-laws, it is then a special meeting, and no other business could lawfully be transacted at such meeting, unless special notice was given. Where the meeting is stated and general, no notice is required, either of the time or place of holding the meeting, or of the business to be transacted. *Angell & Ames on Corporations*, 275. Such is the general law of private corporations.

“But as all corporations are entities of the law merely, and exist and act solely in conformity to their charter and by-laws, it is obvious that the force and effect of

every act of any particular corporation must depend mainly upon the charter and by-laws of that corporation. These are denominated the constitution and laws of the corporation, and, like every other constitution and all other laws, should receive such construction, as to effect the probable intention of the framers. That intention must be judged of as in other cases, by the words used in reference to the subject-matter and circumstances of each particular corporation.

“The charter of this corporation provides for the first meeting of the corporation specially, and that at that meeting, and at all other meetings legally notified, they may make and alter such by-laws as may be thought necessary. There being thus no restriction in the charter, in relation to meetings of the corporation, or the business to be transacted, that subject will be governed exclusively by the by-laws.

“Those by-laws provide for an annual meeting of the corporation, to be holden at their counting room, on the first Wednesday in April, of each year. Thus far the time and place of the meeting is fixed, and there being no restriction in regard to business, any and all business, pertaining to the interest and powers of the corporation, may be transacted. The annual meeting, of all others, is the one when, not only usually, but always, all business is expected to be transacted. And the common custom of a country is of great force in the construction of statutes, as well as contracts. * * *

“But there is no doubt that a corporation might provide that even stated meetings should be warned in a particular manner, and that unless they were so warned, no business could be transacted. This, in regard to special meetings, is done in the present case, and I have no doubt, as such special meetings rest solely upon the notice given, for their authority, that the notice must be such as is required by the by-laws, or the meetings would be wholly without authority, and all business attempted to be then done, would be of no binding force upon the corporation. For the minority, if any, whether present

or absent, could not be bound, except in obedience to the by-laws. For in that mode, and that only, have they consented to be bound. Every member is entitled to notice of special meetings unless the by-laws excuse it. *Kynaston v. Mayor of Shrewsbury*, 2 Strange's R. 1051; *King v. Theoderic*, 8 East's R. 543; 1 Strange's R. 385; 2 Burrow's R. 723; do 728; *Stow v. Wise*, 7 Conn. R. 219."

Question 669: (1.) May a stated meeting be held without notice, if none is required by charter or by-law?

(2.) May a special meeting be held without notice?

(3.) Must a notice of annual or other regular meeting state what is to be done at the meeting?

(4.) Must a notice of a special meeting state the purposes for which it is called?

(5.) If a meeting is properly noticed, must there be further notice of any adjournment of such meeting?

Case No. 670. *Morrill v. Little Falls M'f'g Co.*, 53 Minn. 371.

Point Involved: As to what constitutes a quorum at a stockholders' meeting (in the absence of express stipulation); whether one stockholder can hold a meeting; whether notice of a stated meeting is required when not provided in the by-laws.

MITCHELL, J.: "As affecting the validity of the deeds executed in 1882, in behalf of the corporation, by Thayer as president, the appellants assail the finding of the Court as to the election of directors in August, 1881. The grounds of objection are: First, that no notice was given of the meeting; and, second, that it required a majority of the shares of stock to constitute a quorum to hold a meeting, or, in any event, that one person could not hold a meeting, that at least two persons are necessary to constitute a corporate meeting.

"As to the first point, all that is necessary to say is that the by-laws fixed the time and place of holding the meeting, and neither the charter nor the by-laws required any notice to be given. Under such circumstances, the

rule is that the by-laws themselves are sufficient notice to all the stockholders, and no further notice is necessary. 1 Mor. Priv. Corp., Sec. 479.

“The second objection is equally untenable. Where the charter and by-laws of a corporation are silent on the subject, the common-law rule is that such of the shareholders as actually assemble at a properly convened meeting, although a minority of the whole number, and representing only a minority of the stock, constitute a quorum for the transaction of business, and may express the corporate will, and the body will be bound by their acts. Cook, Stock & S., Secs. 607, 623; 2 Kent, Comm. 293; Mor. Priv. Corp., Sec. 476; *Craig v. First Presbyterian Church*, 88 Pa. St. 42; *Rex v. Varlo*, Cowp. 248; *Columbia Bottom Levee Co. v. Meier*, 39 Mo. 53; *Ex parte Willcocks*, 7 Cow. 402; *Field v. Field*, 9 Wend. 395.

“The contention of appellants that this rule applies only to such organizations as towns, churches, and the like, and not to stock corporations, finds no support either in reason or authority. The correct distinction is between a corporate act to be done by a select body, of a definite number, as, for example, a board of directors or trustees, and one to be performed by the constituent members of the corporation. In the latter case a majority of those who appear may act. This distinction is clearly made in several of the cases above cited, and also in the leading case of *Rex v. Bellringer*, 4 Term R. 810. As was said by Lord Mansfield, in *Rex v. Varlo* (Coup 248): ‘It is in the nature of all corporations to do corporate acts; and, when the power of doing them is not specially delegated to a particular number, the general mode is for the members to meet on the charter days, and the major part who are present to do the act. But, when there is a select body, it is a different thing, for then it is a special appointment.’ And, this being so, it is immaterial whether the number present is only one or more than one. It was held in *Sharpe v. Dawes*, 46 Law J. Q. B. 104, followed reluctantly in another case, that one person cannot constitute a quorum; that at least two persons are

necessary to hold a corporate meeting; but this decision is based upon a narrow lexicographical definition of the word 'meeting,' as the coming together of two or more persons,—a reason that does not commend itself to our judgment.

"Therefore, in our opinion, the Court was justified in holding that the election of directors in 1881 was regular; and it follows that the deeds executed in 1882 by Thayer, the president elected by them, were the deeds of the corporation."

Question 670: What is a quorum in a stockholders' meeting where there is no express regulation? Would the same hold true of a directors' meeting? Why?

Case No. 671. In re Mathiason M'f'g Co., 122 Mo. Ap. 437.

BLAND, P. J.: "* * *

"The next question to be noticed is, should the motion of H. W. Lammers, to set aside the election or first ballot and take a new ballot for three directors, have been voted upon by counting the number of shares of each voter, or by a rising vote and count by the head, as was done. * * *

"Cook, in his volume 2 of his work on Corporations (5 Ed.), Sec. 609, says:

" 'At common law, in public or municipal corporations, each qualified elector has one vote, and only one. This was a natural rule, since each duly qualified citizen voted as a citizen and not as the holder of stock. But the same rule should not apply to private corporations. Stockholders are interested not equally, but in proportion to the number of shares held by them. Naturally and reasonably each share should be entitled to one vote. It has been held, however, that at common law each stockholder had but one vote, irrespective of the number of shares held by him. Where the statutes are silent on the subject, a by-law may give to each shareholder one vote

for each share up to ten, and may fix the proportion of votes which he may cast in excess of that number.

“Generally the charter or statutes prescribe that each share of stock shall be entitled to one vote. And a statutory or charter provision to this effect applies not only to elections, but also to all other questions that may come before the stockholders' meetings. An election to be held by a “majority of stockholders” means a majority in interest.’ ”

Question 671: The M. Corporation has 7 shareholders. A owns 60% of the stock. Can he outvote the other 6 shareholders?

Case No. 672. Venner v. Chicago City Ry. Co., 258 Ill. 523.

Facts: Venner, as stockholder of Chicago City Railway Company, files a bill for the purpose of having declared void a certain agreement creating a voting trust known as the Chicago City and Connecting Railways Collateral Trust and enjoining the trustees from voting any stock in the corporation.

Point Involved: Whether a trust among stockholders in a corporation whereby they transfer their stock to trustees as their proxies to vote for them according to a trust agreement, is valid.

MR. JUSTICE DUNN: “* * * The stockholders can control the affairs of a corporation only through the election of directors, and at every such election there is necessarily a combination of shares upon the persons elected. Such combination may be made at the time of the meeting, but there is no reason why stockholders may not agree beforehand to vote for certain persons as directors, and often they must do so in order to elect the persons desired. There is nothing in the law to prevent the owners of a majority of the stock from giving proxies to the same person. Unless restricted by its terms or by some statutory provision a proxy confers on the grantee a discretion, unlimited either in character

or duration, until revoked. A majority of the stockholders may therefore, by uniting in the same proxy, confer upon an agent unlimited discretion to vote their stock, and there is no policy of the law to prevent their transferring the stock to a trustee with the like unrestricted power. It is the purpose for which the trust was created which must determine its legality. Besides those already cited, it has been decided in the following cases, among others, that the pooling of stock by the owners for the purpose of electing directors and officers and controlling the management and business of the corporation was not against public policy so long as no fraud was committed or wrong done to the other stockholders: *Ohio & Mississippi Railroad Co. v. State*, 49 Ohio St. 668; *Griffith v. Jewett*, 9 Ohio Dec. (Reprint) 627; *Weber v. Della Mountain Mining Co.*, 14 Idaho, 404; *Mobile & Ohio Railway Co. v. Nichols*, 98 Ala. 92; *Hey v. Dolphin*, 92 Hun, 230; *Havemeyer v. Havemeyer*, 43 Super. Ct. (N. Y.) 506; *Brown v. Pacific Mail Steamship Co.*, 5 Blatchf. 525. On the other hand, an agreement is invalid whose object is not the benefit of all the stockholders equally, but is some unfair advantage to the parties to it, only, as where one of the parties is to have a certain office at a certain salary, or the parties to the agreement are to receive the profits to be made out of certain contracts to be entered into by the management under their direction, or the stock of the corporation is to be voted or its affairs managed by the determination of persons other than its stockholders or by a minority of its own stockholders. (*Guernsey v. Cook*, 120 Mass. 501; *Shepaug Voting Trust Cases*, 50 Conn. 553; *Kreissl v. Distilling Co. of America*, 61 N. J. Eq. 50; *Cone v. Russell*, 48 Id. 208; *White v. Thomas Inflatable Tire Co.*, 52 Id. 178; *Morel v. Hoge*, 130 Ga. 625; *Hafer v. New York, Lake Erie & Western Railroad Co.*, 9 Ohio Dec. [Reprint] 470.) Many of the cases relied upon by counsel for the appellant are of this character, and were founded on the principle that the owners of a majority of the stock have no right to use their power to advance

their own private interests at the expense of the minority. In others the complaints were made by parties to the agreement or purchasers from parties to the agreement, claiming that the agreement was not binding upon them, but was revocable at their pleasure. Cases of this kind are not in point, for the appellant is not a party to the trust agreement and cannot complain of its term unless his rights as a stockholder have been injuriously affected by it or will necessarily be injuriously affected."

Question 672: (1.) Is a voting trust among stockholders of a corporation valid?

(2.) If the stockholders of competing firms join in a voting trust, is the trust legal?

Case No. 673. In re Barker, 6 Wend. (N. Y.) 509.

Facts: The report reads as follows:

"An election of directors of the Mercantile Insurance Company of New York was holden on the 10th of January, 1831. Jacob Barker demanded to vote on 1,290 shares of stock standing in his name on the books of the company, 1,255 in his own right and 35 as trustee for his minor children. His vote was challenged, and the challenge allowed by the inspectors. Had he been permitted to vote on the whole number of shares standing in his name, Samuel Hazard, and six other persons named in the proceedings, who the inspectors certified were duly elected, would not have been elected, but seven other persons, for whom Jacob Barker offered to vote, would have been elected in their stead; or had he been permitted to vote only on the thirty-five shares held by him as trustee, the effect would have been to have given a majority of votes to four individuals, who were voted for at the election as directors, and who were not returned as elected over Samuel Hazard and five other persons, who had an equal number of votes, and who were returned duly elected. The objection to Barker's voting on the 1,255 shares was that they were hypothecated to the company to their full value. The company was incorporated in 1818. This case also presented the

question whether an alien stockholder of this company has the right to vote by proxy: such vote having been offered, and rejected by the inspectors."

By the court, SAVAGE, CH. J.: "In the case *Ex parte Holmes*, 5 Cowen, 426, we set aside an election of directors of an insurance company, because a trustee had been allowed to vote upon stock belonging to the company; not because a trustee had been permitted to vote instead of the *cestui que trust*, but for the reason that the stock in that case could not be voted upon, being the property of the company, controlled by its officers; and we held, that neither within the meaning of the charter of the company, nor of the act under which the proceedings were had, could it be tolerated, that the officers of a moneyed institution should wield such stock, however obtained, to control the result of an election of directors. Such is the principle settled by that case, and what was said in relation to the rights of a trustee or *cestui que trust* to vote on stock, standing in the name of the trustee, either generally or specially, in his representative character, was said in reference to the peculiar circumstances of the case. The court never could have doubted the right of a person to vote upon stock standing in his name although held by him in trust for another; the legal estate is in him, and until divested by assignment, either voluntary or compulsory, he is the only person entitled to vote. Indeed, the case *Ex parte Holmes*, admits that if the stock stands in the name of the trustee without expressing any trust, he has the right to vote. Jacob Barker, therefore, was entitled to vote upon the thirty-five shares holden by him as the trustee of his minor children.

"He was also entitled to vote upon the 1,255 shares standing in his name in his own right, although they were hypothecated to their full value. So was the decision of the court in *Ex parte Wilcocks*, 7 Cowen, 402, where we held, that until the pledge was enforced and the title made absolute in the pledgee, and the names changed on the books, the pledgor should be permitted to vote."

Question 673: (1.) A owning certain certificates of stock by will bequeaths them to B in trust for C, D, and E, who are A's unmarried sisters. B has certificates made out to him as trustee. Who can vote this stock? (The trust in this case is not a voting trust.)

(2.) If stock is pledged, can the pledgor or pledgee vote it?

(3.) If a corporation owns its own stock, can it vote it?

Case No. 674. Market Street R. Co. v. Hellman, 109 Cal. 571.

Facts: Proceeding to contest the consolidation of certain corporations. Among many other points made, the objection was raised that appears in the following opinion:

SEARLES, Chancellor: “* * *

“In the case of the Omnibus Cable Company, 1,470 of its shares were owned by, and stood in the name of Daniel Stein, who died, say, six months before the consent was signed by his executors, and as the stock was never transferred on the books to the names of such executors it is contended they were not authorized to consent. ‘The shares of stock of an estate of a minor or insane person may be represented by his guardian, and of a deceased person by his executor or administrator.’ (Civ. Code, Sec. 313.)

“No transfer of the stock to the executors was necessary to entitle them to vote it. Spelling on Corporations, at Sec. 380, says: ‘In case of the death of a stockholder his administrator becomes, by operation of law, vested with the legal title to the stock, and is entitled to vote it at all elections without a transfer upon the stock-book, * * * and the fact that the decedent held the stock subject to a trust would not alter it. Upon the death of a trustee of personal property the trust would devolve upon his representative, and he becomes legal owner as to all persons except the *cestui que* trust, and the corporation has nothing to do with the equities between the immediate parties to the trust or between the legal owner and third parties, as regards the rights

of voting.' (See cases cited by same author in footnote to Sec. 380.)''

Question 674: Can an executor vote stock owned by him as such executor? Suppose that upon the books the stock still stands in the name of the deceased, but the executor brings in ample proof of his appointment and qualification as such executor, can he vote the stock?

Case No. 675. J. H. Wentworth Co. v. French, 176 Mass. 442.

HOLMES, C. J.: "This is a petition for a writ of mandamus declaring that Benjamin Dickerman, George W. Dickerman, and Charles W. Boynton are the duly elected directors, and that Benjamin Dickerman is the duly elected treasurer and clerk, of the petitioning corporation. Benjamin Dickerman is the holder of a certificate for 100 shares of stock in the company, which states on its face that it is 'held as collateral for the note of James H. Wentworth for \$10,000, dated April 8, 1898.' There has been no breach of the conditions of the pledge. If Benjamin Dickerman had the right to vote on these shares, then the persons named have been elected directors, treasurer and clerk, and, subject to certain questions to be dealt with, a peremptory writ ought to issue, as in *American Railway-Frog Co. v. Haven*, 101 Mass. 398; otherwise the petition should be dismissed.

"The corporation has to go by its record in determining the right to vote, and therefore, if a certificate of stock shows a certain person to be a member, the corporation must recognize him as member, with the right to vote as an incident to his membership. *Crease v. Babcock*, 10 Met. 525, 546. *National Bank v. Case*, 99 U. S. 628, 631. *Adderly v. Storm*, 6 Hill, 624, 627. *Franklin Bank v. Commercial Bank*, 36 Ohio St. 350, 355. *Magruder v. Colston*, 44 Md. 349, 356. *Commonwealth v. Daltzell*, 152 Penn. St. 217, 223. If the certificate holder is a pledgee, it may be that before breach the pledgor will

be recognized in equity as the general owner for the purpose of voting as for other purposes. But in such cases the result has been worked out by compelling the holder to give a proxy to the pledgor, and thus the conclusiveness of the record for corporate purposes has been left unimpaired. *Vowell v. Thompson*, 3 Cranch C. C. 428. *Hoppin v. Buffum*, 9 R. I. 513, 518.

"The provision in Pub. Sts. c. 105, Sec. 25, by which a certificate of stock issued as a pledge or the like shall express the fact and the name of the pledgor 'who alone shall be responsible as a stockholder,' goes back through Gen. Sts. c. 68, Sec. 13, to St. 1838. c. 98, Sec. 3, and, it would seem, may have been suggested by the case of *Crease v. Babcock*, as the bill in that case was brought in 1837. When the requirements of that section are complied with, the form of the certificate allows the pledgor to be recognized as the member of the corporation for the purpose of voting as well as for the purpose of fixing responsibility, and under such circumstances the general understanding is that he is the proper person to vote. The statute in a different way reaches the result which equity reached by compelling the pledgee to give a proxy."

(The Court holds that the statute of Massachusetts by which the right of vote is put in the pledgor has not been complied with and as the pledgee was the record stockholder he had a right to vote.)

Case No. 676. *Kinnan v. Sullivan Co. Club*, 50 N. Y. Suppl. 95.

RUMSEY, J.: The corporation has no power, by its by-laws, to refuse to permit a delinquent stockholder to vote upon its stock than it has to refuse him the privilege of making a transfer of the stock. The right to vote upon stock of a corporation is essential for the protection of its owner. It is one of those inherent rights which goes with the purchase of the stock, and, unless it is limited by the articles of association, which authorized the cor-

poration to exclude from the right of voting a person who is in arrears upon his stock, the right does not exist. It cannot be arrogated by the corporation to itself after the stock has been issued. It makes no difference, in this regard, whether the stockholder agrees to take the stock subject to the by-laws of the corporation or not. No by-law can be made which takes away from a stockholder a right which is vested in him at the time of the purchase of his stock.

Question 676: May a corporation deprive a stockholder of his voting power because he is delinquent? Suppose he has subscribed to abide by the by-laws, and a by-law is subsequently passed attempting to deprive him of his voting power, is the by-law binding on him? What if the by-law were already in force when he became a stockholder?

Sec. 501. Dividends.

Case No. 677. Goodwin v. Hardy, 57 Me. 143.

Point Involved: To whom dividends belong as between owners of stock when dividend is declared and owner of stock when dividend is payable.

APPLETON, C. J.: “* * * The stockholders have no claim to a dividend until it is declared. Until that time, it belongs to the corporation precisely as any other property it may own. When a distribution of the funds of a corporation, whether of the whole or of a part, is ordered, it is to be made between those who, at that time, are the owners of its stock. The law on this subject is very clearly stated by Mr. Justice Sargent, in *March v. Eastern R. R. Co.*, 43 N. H. 520. ‘The purchaser of a share of a stock in a corporation,’ he remarks, ‘takes the share with all its incidents, and among these is the right to receive all future dividends,—that is, its proportional share of all profits not then divided, and as we understand the law and the usage of such corporations, it is wholly immaterial at what times and from

what sources these profits have been earned; they are incident to the share, to which a purchaser becomes at once entitled, provided he remains a member of the corporation until a dividend is made.' * * *''

Question 677: The M corporation has on May 20th undivided profits sufficient to declare a 7% dividend. A is owner of stock in M corporation. He sells it to B on May 20th. On May 21st the corporation declares a dividend. The dividend is by its terms made payable July 1st. On June 1st B sells to C, who owns until after July 1st. Who is entitled to the dividend?

Sec. 502. Right to Prevent Ultra Vires Acts and to Sue or Defend in Behalf of Corporation.

Case No. 678. Hawes v. Oakland, 104 U. S. 450.

Facts: Complainant files his bill as a stockholder of the Contra Costa Water Works Company against such company, the city of Oakland, and the directors, alleging that the company is furnishing the city of Oakland with water for all purposes free of charge whereas by its charter it is only required to furnish such city water free for putting out fires and other cases of emergency, that he has applied to the directors to stop this abuse and that they decline to take any action. The company defends by demurrer that the plaintiff as stockholder has no power to maintain such a suit.

Point Involved: Whether a stockholder can file a bill to prevent *ultra vires* acts; what conditions are precedent to his maintaining such bill.

MR. JUSTICE MILLER: “* * *

“We understand that doctrine to be that to enable a stockholder in a corporation to sustain in a court of equity in his own name, a suit founded on a right of action existing in the corporation itself, and in which the corporation is the appropriate plaintiff, there must exist as the foundation of the suit—some action, or threatened action of the managing board of directors, or

trustees of the corporation which is beyond the authority conferred on them by their charter or other source of organization; or such fraudulent transaction completed or contemplated by the acting managers, in connection with some other party or among themselves, or with other shareholders as will result in serious injury to the corporation; or to the interests of other shareholders; or where the board of directors or a majority of them, are acting for their own interests, in a manner destructive of the corporation itself, or of the rights of the other shareholders; or where the majority of shareholders themselves are oppressively and illegally pursuing a course in the name of the corporation, which is in violation of the rights of the other shareholders, and which can only be restrained by the aid of a court of equity. Possibly other cases may arise in which, to prevent irremediable injury, or a total failure of justice, the Court would be justified in exercising its powers, but the foregoing may be regarded as an outline of the principles which govern this class of cases * * * He must make an earnest, not a simulated effort, with the managing body of the corporation, to induce remedial action on their part, and this must be made apparent to the Court."

[The Court holds that a stockholder before filing such a bill must attempt to get relief from the directors and if possible from the stockholders, and that his efforts are unavailing, and that the complainant in this case has made no such effort as is required to give him standing to file a bill.]

Question 678: (1.) When can a stockholder sue or defend in behalf of the corporation?

(2.) What course must the stockholder take to entitle him to represent the corporation in such a suit?

(3.) A filed a bill showing that the corporation in which he was a stockholder was about to enter into an illegal trust, and asked for an injunction. Will it be granted? (*Harding v. Amer. Glucose Co.*, 182 Ill. 551.)

Case No. 679. Babcock v. Farwell, 245 Ill. 41.

MR. JUSTICE DUNN: “* * *

“Since Babcock could not himself have maintained the suit in his personal capacity, neither could his executor, nor appellant as his legatee. By expressly waiving his objections to the transactions now complained of, he debarred himself from seeking relief against them in his own right. He could not, therefore, indirectly obtain such relief by bringing suit in the right of the corporation or of other stockholders. A complainant cannot maintain a bill, and obtain relief unless he has himself sustained a wrong. The theory of a stockholder’s suit is, that the stockholder has sustained a wrong through the injurious effect upon his stock of the wrong done to the corporation. If he has himself consented to or participated in the acts constituting such wrong, or has waived his right to object to them, he cannot afterwards maintain a bill, on account of such transactions, for the benefit of the corporation or of other stockholders. (Burt v. British Ass’n., 4 DeG. & J. 158; Brown v. DeYoung, 167 Ill. 549; Wells v. Northern Trust Co., 195 id. 288.) Neither can an assignee of stock maintain a suit in regard to transactions with the corporation done or assented to by his assignor. The purchaser of shares of stock requires no greater rights than his vendor. He holds by the same title and subject to the same liability. Shares of stock are merely choses in action, and the successive owners acquire only the rights held by their predecessors in title. Home Ins. Co. v. Barber, 67 Neb. 644; Venner v. Atchison, Topeka and Santa Fe Railroad Co., 28 Fed. Rep. 581; Church v. Citizen’s Railroad Co., 78 id. 526; * * *”

Question 679: A, as stockholder in the M corporation, acquiesces in wrongful conduct on the part of the directors in managing the corporation. A assigns to B, who then for the first time learns of the *ultra vires* acts, and files a bill to set aside the acts. Will such bill obtain relief?

Sec. 503. Right to Inspect Corporate Books and Records.

Case No. 680. *Venner v. Chicago City Ry. Co.*, 246 Ill. 170.

MR. CHIEF JUSTICE VICKERS: “* * *

“There is a well recognized distinction between the right of a stockholder to inspect the books and papers of a corporation under the common law and an unlimited right given by statute. Under the former the examination can only be compelled where the stockholder asks it in good faith and for reasons connected with his rights as stockholder. Where the right is conferred by statute in absolute terms, the purpose or motive of the stockholder in making the demand for an inspection is not material and he cannot be required to state his reasons therefor. (Thompson on Corporations,—2d ed.—Sec. 4516.) The weight of American authority is to the effect that where the right is statutory the stockholder need not aver or show the object of his inspection, and it is no defense under a statute granting the absolute right to inspection to allege improper purposes or that the petitioner desires the information for the purpose of injuring the business of the corporation. A clear legal right given by a statute cannot be defeated by showing an improper motive. If this were so, the stockholder would be driven from a certain definite right given him by the statute to the realm of uncertainty and speculation.”

Question 680: (1.) To what extent did the common law give a stockholder a right to inspect corporate records?

(2.) What is the right by statute? Do the two differ?

Sec. 504. Right to Contract and Deal With Corporation.

(Note: See the remarks of Justice Miller in *Twin Lick Oil Co. v. Marbury*, 91 U. S. 587, *post*, Case No. 684. A stockholder has the same right as a stranger to contract with the corporation. In doing so, he may take security on the property of the corporation, and afterwards enforce such security as any stranger might. He may sue and get judgment against the corporation and levy an execution against its property.)

PART XXVIII

DIRECTORS AND ADMINISTRATIVE OFFICERS

Chapter Ninety-eight. Directors.
Chapter Ninety-nine. Administrative Officers.

CHAPTER NINETY-EIGHT

DIRECTORS

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| § 505. Election and qualification of directors. | § 508. Director a trustee; his liability to the corporation. |
| § 506. Title to office; contest. | § 509. Liability of director to third persons. |
| § 507. Directors' meetings. | |

Sec. 505. Election and Qualification of Directors.

Case No. 681. Wight v. R. Co., 117 Mass. 226.

GRAY, C. J.: "Although the directors of a railroad corporation are usually chosen by the stockholders from their own number, there is no rule of law that makes the holding of stock an indispensable qualification of a director, unless prescribed by some act of the legislature or by-law of the corporation.

Question 681: May one not a stockholder be a director?

(Note: It is usual of course, to require that a stockholder be a director, but in the absence of statutory provisions, or charter or by-law requirement, a director need not be a stockholder.)

Case No. 682. Com. v. Hemingway, 7 L. R. A. (Pa.) 360.

WILLIAMS, J., delivered the opinion of the Court:

“In the case of *Detwiller v. Com.*, *ante*, p. 357, in which an opinion has been filed at the present term, we have considered the question: ‘Can a citizen of the United States, who is not a citizen of Pennsylvania, become a stockholder in the Farmers & Mechanics Institute of Northampton County?’ We are now to push our inquiries one step further, and determine whether one who is not a citizen of the United States, but is, and for many years has been, a resident and property holder in Pennsylvania and in Northampton County, can become a stockholder in the same association; and whether, if he may become a stockholder, he is entitled to vote as such at the stockholders’ meetings; and finally, whether he may be legally elected a director of the association. For the reasons given in *Detwiller v. Com.*, *supra*, we think he may become a stockholder. The stock being personal property, he may acquire it by gift or purchase. An alien could at common law buy personal goods, and sell them; and, except in the case of an alien enemy, there was no restriction upon trade with aliens. If he can acquire the stock, he can acquire with it all the rights and privileges which its ownership confers, among which is the right to have a voice in the control of the enterprise, and the selection of those who are to conduct its affairs. He may therefore vote in the same manner, and with the same effect, as any other stockholder may do. Why may he not become a director? The office is not a political one.

Question 682: May an alien be a stockholder? a director?

(Note: A stockholder may by the laws of all states be a non-resident or an alien. Ordinarily by by-law or statute a director must be a stockholder and a resident of the state.)

Sec. 506. Title to Office; Contest.

(Note: A director’s title to his office may be contested in the courts. The usual action is an action in a court of law (as dis-

tinguished from a court of equity) by *quo warranto* proceedings. But a court of equity will take jurisdiction when the affairs of the corporation are in such condition by reason of the contest that immediate control by receivership or injunction or otherwise is necessary.)

Sec. 507. Directors' Meetings.

Case No. 683. Doernbecher v. Columbia City Lumber Co. et al., 21, Oregon, 573.

Facts: The facts are stated in the opinion.

Point Involved: Whether a directors' meeting held without notice to all the directors (and not participated in by all the directors notwithstanding such lack of notice) is void, where a majority of the directors attend and such majority all vote in favor of the act in question.

BEAN, J.: “* * *

“The company being largely indebted to William Lowe prior to the fourteenth day of May, 1889, Lowe assigned his claim to plaintiff, who on that day duly commenced an action against the company to recover the amount due thereon, which finally resulted in a judgment in plaintiff's favor. After the commencement of this action and before final judgment, Directors Dunbar, Wallace, and McDougall without any notice to the other directors, assembled by mutual consent at the office of Emmons & Emmons in the city of Portland, and pretended to pass a resolution authorizing the president and secretary of the company to assign all its property to R. W. Emmons for the benefit of its creditors, after which a deed of assignment was executed in due form. It is claimed by plaintiff that the proceedings of this meeting are illegal and void, because it was convened without notice, verbal or written, to the directors who did not attend; and in this we think he is abundantly supported both by reason and authority.

“It is indispensable to a legal meeting of the directors of a corporation for the transaction of business, that all

the directors have notice, actual or constructive, of the time and place of the meetings. Otherwise, it might happen that a bare majority of the quorum present being a minority of the whole, would do some act contrary and in opposition to the will of the majority. The stockholders and other persons interested in the corporation are entitled to the combined wisdom of all the directors. Where the time and place has not been fixed by some other competent authority, such meetings must be called by personal notice to each member of the board of directors. 'It is not only a plain dictate of reason,' says Mr. Justice Cowan, 'but a general rule of law, that no power or function entrusted to a body consisting of a number of persons, can be legally exercised without notice to all the members composing such body.' (*People v. Batchellor*, 22 N. Y. 134.) And this is so for the transaction of even ordinary business.

"It is no excuse to say that the three who were present all voted for the resolution, and had the other two been present the result would have been the same. The right to deliberate, and by their advice and counsel convince their associates, if possible, is the right of the minority, of which they cannot be deprived by the arbitrary will of the majority. (*Com. v. Cullen*, 13 Pa. St. 133.)

"All persons interested in the corporation are entitled to the advice and influence as well as the votes of all the directors. And, says Mr. Morawetz, 'while it may not be the duty of every director to be present at every meeting of the board, yet it is certainly the intention of the shareholders that every director shall have a right to be present at every meeting, in order to acquire full information concerning the affairs of the corporation and to give the other directors the benefit of his judgment and advice. If meetings could be held by a bare quorum without notifying the other directors, the majority might virtually exclude the minority from all participation in the management of the company.' (*Morawetz Corp. Sec. 532.*)

"Where the meeting is a general or stated one, provided for in some resolution or by-law, notice of the time

and place of the meeting is perhaps, in the absence of a different provision in the charter or by-laws of the company, not necessary. (State ex rel. v. Bonnell, 35 Ohio St. 10; People v. Batchellor, *supra*; Merritt v. Ferris, 22 Ill. 303; Warner v. Mower, 11 Vt. 385.) In such case each member is presumed to have notice of the day fixed for the meeting. But if the meeting be a special one, personal notice, if practicable, is necessary to each member unless all are present and participate in the proceedings. And such notice is essential to the power of the board to do any act which will bind the corporation, and without such notice or the presence of all the directors its acts are void."

Question 683: Is a notice of a directors' special meeting necessary? If no notice is given and a majority of the directors attend and vote for the act in question, why is it material that the other directors are not notified?

(Note: A majority of the directors is a quorum (in the absence of express provision otherwise) if the meeting is properly called and noticed; and a majority of the quorum may transact business. Thus it is possible for two out of five directors to pass resolutions.)

Sec. 508. Director a Trustee; His Liability to the Corporation.

Case No. 684. Twin Lick Oil Co. v. Marbury, 91 U. S. 587.

Facts: Marbury was a stockholder and a director in the complainant corporation. The corporation became embarrassed in 1867 and borrowed \$2,000 from Marbury, for which a note was given secured by mortgage on all of the property of the corporation. The property was sold under the terms of the mortgage to effectuate the security, and was bought in by defendant Marbury. This bill is filed four years later to have Marbury declared a trustee of such property and for an accounting of the rents and profits. The bill charges that defendant abused

his trust relation to the company to take advantage of its difficulties and to buy its property at a sacrifice, concealing material facts. The Court finds from the evidence that defendant loaned the money in good faith, and honestly for the assistance of the company, and took reasonable security, and that when the money was due there was no prospect of it being paid and the property was then sold, as the only means whereby defendant could get back his money, and that defendant took no advantage of his position and made no concealment.

Point Involved: Whether a contract by a director with a corporation is voidable or void; whether laches will bar a suit by the corporation (or its stockholders) to set aside a voidable contract by a director.

MR. JUSTICE MILLER: “* * *

“The first question which arises in this state of the facts is, whether defendant’s purchase was absolutely void.

“That a director of a joint-stock corporation occupies one of those fiduciary relations where his dealings with the subject-matter of his trust or agency, and with the beneficiary or party whose interest is confided to his care, is viewed with jealousy by the courts, and may be set aside on slight grounds, is a doctrine founded on the soundest morality, and which has received the clearest recognition in this court and in others. *Koehler v. Black River Falls Iron Co.*, 2 Black. 715; *Drury v. Cross*, 7 Wall. 299; *Luxenburg R. R. Co. v. Maquay*, 25 Beav. 568; *The Cumberland Co. v. Sherman*, 30 Barb. 553; 16 Md. 456. The general doctrine, however, in regard to contracts of this class, is, not that they are absolutely void, but that they are voidable at the election of the party whose interest has been so represented by the party claiming under it. We say, this is the general rule: for there may be cases where such contract should be void *ab initio*; as when an agent to sell buys of himself, and by his power of attorney conveys to himself that which he was authorized to sell. But, even here, acts which amount to a ratification by the principal may validate the sale.

“The present case is not one of that class. While it is true that the defendant, as a director of the corporation, was bound by all those rules of conscientious fairness which courts of equity have imposed as the guides for dealing in such cases, it cannot be maintained that any rule forbids one director among several from loaning money to the corporation when the money is needed, and the transaction is open, and otherwise free from blame. No adjudged case has gone so far as this. Such a doctrine, while it would afford little protection to the corporation against actual fraud or oppression, would deprive it of the aid of those most interested in giving aid judiciously, and best qualified to judge of the necessity of that aid, and of the extent to which it may safely be given.

“There are in such a transaction three distinct parties whose interest is affected by it; namely, the lender, the corporation, and the stockholders of the corporation.

“The directors are the officers or agents of the corporation, and represent the interests of that abstract legal entity, and of those who own the shares of its stock. One of the objects of creating a corporation by law is to enable it to make contracts; and these contracts may be made with its stockholders as well as with others. In some classes of corporations, as in mutual insurance companies, the main object of the act of incorporation is to enable the company to make contracts with its stockholders, or with persons who become stockholders by the very act of making the contract of insurance. It is very true, that as a stockholder, in making a contract of any kind with the corporation of which he is a member, is in some sense dealing with a creature of which he is a part, and holds a common interest with the other stockholders, who, with him, constitute the whole of that artificial entity, he is properly held to a larger measure of candor and good faith than if he were not a stockholder. So, when the lender is a director, charged, with others, with the control and management of the affairs of the corporation, representing in this regard the aggregated interest

of all the stockholders, his obligation, if he becomes a party to a contract with the company, to candor and fair dealing, is increased in the precise degree that his representative character has given him power and control derived from the confidence reposed in him by the stockholders who appointed him their agent. If he should be a sole director, or one of a smaller number vested with certain powers, this obligation would be still stronger, and his acts subject to more severe scrutiny, and their validity determined by more rigid principles of morality, and freedom from motives of selfishness. All this falls far short, however, of holding that no such contract can be made which will be valid; and we entertain no doubt that the defendant in this case could make a loan of money to the company; and as we have already said that the evidence shows it to have been an honest transaction for the benefit of the corporation and its shareholders, both in the rate of interest and in the security taken, we think it was valid originally, whether liable to be avoided afterwards by the company or not.

“If it be conceded that the contract by which the defendant became the creditor of the company was valid, we see no principle on which the subsequent purchase under the deed of trust is not equally so. The defendant was not here both seller and buyer. A trustee was interposed who made the sale, and who had the usual powers necessary to see that the sale was fairly conducted, and who in this respect was the trustee of the corporation, and must be supposed to have been selected by it for the exercise of this power. Defendant was at liberty to bid, subject to those rules of fairness which we have already conceded to belong to his peculiar position; for, if he could not bid, he would have been deprived of the only means which his contract gave him of making his debt out of the security on which he had loaned his money. We think the sale was a fair one. The company was hopelessly involved beside the debt to defendant. The well was exhausted, to all appearance. The machinery was of little use for any other purpose, and would not pay trans-

portation. Most of the stockholders who now promote this suit refused to pay assessments on their shares to aid the company. Nothing was left to the defendant but to buy it in, as no one would bid the amount of his debt.

* * *

“The doctrine is well settled, that the option to avoid such a sale must be exercised within a reasonable time. This has never been held to be any determined number of days or years as applied to every case, like the statute of limitations, but must be decided in each case upon all the elements of it which affect that question. These are generally the presence or absence of the parties at the place of the transaction, their knowledge or ignorance of the sale and of the facts which render it voidable, the permanent or fluctuating character of the subject-matter of the transaction as affecting its value, and the actual rise or fall of the property in value during the period within which this option might have been exercised.

“In fixing this period in any particular case, we are but little aided by the analogies of the statutes of limitation; while, though not falling exactly within the rule as to time for rescinding, or offering to rescind, a contract by one of the parties to it for actual fraud, the analogies are so strong as to give to this latter great force in the consideration of the case. In this class of cases the party is bound to act with reasonable diligence as soon as the fraud is discovered, or his right to rescind is gone. No delay for the purpose of enabling the defrauded party to speculate upon the chances which the future may give him of deciding profitably to himself whether he will abide by his bargain, or rescind it, is allowed in a court of equity.”

Question 684: (1.) In this case was the contract fair or unfair?

(2.) Does the question whether it was fair or unfair decide the right of the corporation or its stockholders to have it set aside? (See Note:)

(Note: The rule worked out by the authorities as to contracts made between a corporation and a director seems to be this:

That such a contract if made by the director through his own vote or other action as the representative of the corporation, is voidable, whether fair or not, at the instance of any stockholder who has not consented thereto, and who is not guilty of laches in prosecuting his suit; that such a contract if made by the director on the vote of other directors who compose the majority, and who are not "dummies" is voidable if not fair, and if not made with the fullest disclosure of facts by the contracting director; but otherwise it is not voidable, but binding.)

Case No. 685. Klem v. Independent Brew. Ass'n, 231 Ill. 594.

Facts: The facts appear in the opinion.

Point Involved: That fraudulent acts by directors are not validated by a ratification of stockholders, who are controlled by the directors.

MR. JUSTICE FARMER: "It is not to be tolerated that the directors of a corporation owning and controlling a majority of the stock shall be permitted to cause their unlawful acts to be ratified by calling a stockholders' meeting which they control as effectually as they do the board of directors and causing a majority of the stock to be voted in favor of the ratification. If the acts complained of were unaffected by any unlawful and fraudulent motive and conduct and it were a question simply whether the directors had exercised good judgment for the best interests of the corporation, a different rule would perhaps apply; for the directors and a majority of stockholders have the right to control, direct and manage the corporation. In this case, however, the directors purchased from themselves property for an amount much in excess of its value and this was a fraud upon the stockholders which could not be ratified nor condoned by a stockholders' meeting at which a majority of the votes cast in favor of the ratification were passed by or under the control of the directors who were guilty of the wrong doing. If the reverse were true then the minority stockholders would be at the mercy of the majority who would be able to elect the directors and be able to control stock-

holders' meetings and thereby ratify the acts of the directors however wrongful and injurious they might be to the corporation."

Question 685: State the point here involved and the Court's decision.

Case No. 686. *Hun v. Cary*, 82 N. Y. 65.

Facts: Suit brought by receiver of Central Savings Bank against trustees of the bank to recover damages caused by their alleged misconduct. The bank was organized in 1867. Up to January, 1873, its deposits had averaged \$70,000 and its expenses exceeded its income. In May of that year, the trustees voted to purchase a lot for \$29,250, paying \$10,000 in cash, and put up a building costing \$27,000, giving back a mortgage for \$30,500. The object was to increase the business of the bank. At the time of the purchase the bank occupied leased rooms and its liabilities exceeded its assets.

Point Involved: Whether directors are liable to the corporation for improvidence; whether the acts in question were mere errors of judgment or reckless acts; the duty of care upon a director in managing the corporate business.

EARL, J.: "This action was brought by the receiver of the Central Savings Bank of the City of New York, against the defendants, who were trustees of the bank, to recover damages which, it is alleged, they caused the bank by their misconduct as such trustees.

"The first question to be considered is the measure of fidelity, care and diligence which such trustees owe to such a bank and its depositors. The relation existing between the corporation and its trustees is mainly that of principal and agent, and the relation between the trustees and the depositors is similar to that of trustee and *cestui que trust*. The trustees are bound to observe the limits placed upon their powers in the charter, and if they transcend such limits and cause damage they incur

liability. If they act fraudulently or do a wilful wrong, it is not doubted that they may be held for all the damage they cause to the bank or its depositors. But if they act in good faith within the limits of powers conferred, using proper prudence and diligence, they are not responsible for mere mistakes or errors of judgment. That the trustees of such corporations are bound to use some diligence in the discharge of their duties cannot be disputed. All the authorities hold so. What degree of care and diligence are they bound to exercise? Not the highest degree, not such as a very vigilant or extremely careful person would exercise. If such were required, it would be difficult to find trustees who would incur the responsibility of such trust positions. It would not be proper to answer the question by saying the lowest degree. Few persons would be willing to deposit money in savings banks, or to take stock in corporations, with the understanding that the trustees or directors were bound only to exercise slight care, such as inattentive persons would give to their own business, in the management of the large and important interests committed to their hands. When one deposits money in a savings bank, or takes stock in a corporation, thus divesting himself of the immediate control of his property, he expects, and has the right to expect, that the trustees or directors, who are chosen to take his place in the management and control of his property, will exercise ordinary care and prudence in the trusts committed to them—the same degree of care and prudence that men prompted by self-interest generally exercise in their own affairs. When one voluntarily takes the position of trustee or director of a corporation, good faith, exact justice, and public policy unite in requiring of him such a degree of care and prudence, and it is a gross breach of duty—*crassa negligentia*—not to bestow them.

“It is impossible to give the measure of culpable negligence for all cases, as the degree of care required depends upon the subjects to which it is to be applied. (First Nat. Bank v. Ocean Nat. Bank, 60 N. Y. 278.) What

would be slight neglect in the care of a quantity of iron might be gross neglect in the care of a jewel. What would be slight neglect in the care exercised in the affairs of a turnpike corporation or even of a manufacturing corporation, might be gross neglect in the care exercised in the management of a savings bank intrusted with the savings of a multitude of poor people, depending for its life upon credit and liable to be wrecked by the breath of suspicion. There is a classification of negligence to be found in the books, not always of practical value and yet sometimes serviceable, into slight negligence, gross negligence, and that degree of negligence intermediate the two, attributed to the absence of ordinary care; and the claim on behalf of these trustees is that they can only be held responsible in this action in consequence of gross negligence, according to this classification. If gross negligence be taken according to its ordinary meaning—as something nearly approaching fraud or bad faith—I cannot yield to this claim; and if there are any authorities upholding the claim, I emphatically dissent from them.

“It seems to me that it would be a monstrous proposition to hold that trustees, intrusted with the management of the property, interests and business of other people who divest themselves of the management and confide in them, are bound to give only slight care to the duties of their trust, and are liable only in case of gross inattention and negligence; and I have found no authority fully upholding such a proposition.” [Held that the trustees were not guilty of a mere error of judgment, but improvidence, and reckless extravagance and therefore liable to the receiver.]

Question 686: What degree of care must a director show? Does the nature of the business help to determine? Suppose the director does not act in bad faith, is that alone enough to save him? Is a director always liable for errors of judgment?

Sec. 509. Liability of Director to Third Persons.

Case No. 687. Morgan v. Skiddy et al., 62 N. Y. 319.

Facts: Certain directors sanctioned the circulation of a prospectus known to contain false statements of ma-

terial facts in respect to the assets and condition of the corporation, the natural tendency of which was to induce subscriptions. Plaintiff relying thereon bought stock. He sues the directors for fraud.

Point Involved: Whether a director is personally liable who sanctions false statements to induce subscriptions.

ANDREWS, J.: “* * *

“The representations made in the prospectus as to the exploration made on the land of the company were false. But two or three shafts had been sunk upon this property. Very little work had been done upon it, and the presence of valuable ores in any considerable quantities had not been discovered. * * * The false statement in the prospectus related to an existing fact which materially affected the value of the shares; it was prepared for the purpose of circulation and to induce investments in the stock of the company. If the plaintiff purchased his stock relying upon the truth of the prospectus, he has a right of action for deceit against the persons who, with knowledge of the fraud and with intent to deceive, put it in circulation. The representation was made to each person comprehended within the class of persons who were designed to be influenced by the prospectus; and when a prospectus of this character has been issued no other relation or privity between the parties need be shown, except that created by the wrongful and fraudulent act of the defendants in issuing or circulating the prospectus, and the resulting injury to the plaintiff. (Clark v. Dixon, 6 C. B. [N. S.], 453; Central Railroad Co. v. Kish, Law Rep. [2 Eng. and Irish App.], 100.)”

Question 687: In what way were the false statements made in this case? Did the directors know the statements were false? Were they held liable?

(Note: Statutes extend or declare the liability of a director. Thus a director may be made liable for knowingly making false financial statements, allowing the debts to exceed the capital stock, etc., allowing the corporation to proceed to business without having complied with certain statutes, etc.)

CHAPTER NINETY-NINE

ADMINISTRATIVE OFFICERS

§ 510. In general.

§ 511. The various officers.

Sec. 510. In General.

(Note: The usual administrative officers of a corporation are the President, Secretary and Treasurer. They are elected by the directors. In addition a corporation may have other officers, as vice presidents, chairman of board, cashier, etc. The powers of these officers differ widely in different corporations, according to the actual or apparent power given in each case.)

Sec. 511. The Various Officers.

(Note: The President—The president of a corporation has the duty of presiding at directors' meetings and in some states, but not in others, he is presumed to be, in the absence of evidence to the contrary, a general manager.

The Vice-President—The vice-president is an officer whose powers as such are very ill defined and usually reference must be made to the particular facts in the case. He may as a matter of fact, have very extensive powers, or his office may be purely honorary.

The Treasurer—The treasurer has the charge of the books relating to his office, and the funds of the corporation. His duty is to receive the funds and pay them out upon proper vouchers or directions. He has very little implied power to bind the corporation.

The Secretary—The secretary of the corporation has charge of its books and its seal, and his duty is to keep the usual secretarial books, attend to the ordinary details of management, send out

notices of meetings, attend stockholders' and directors' meetings, and act as secretary of those meetings.

Other Administrative Officers—Besides the officers named, any corporation may have certain other administrative officers whose powers and duties depend in each case upon the particular facts involved.)

PART XXIX
FOREIGN CORPORATIONS

- | | |
|------------------------------|--|
| Chapter One Hundred. | Foreign Corporation
Defined; Its Gen-
eral Status. |
| Chapter One Hundred and One. | Same Subject Con-
tinued. |

CHAPTER ONE HUNDRED
**FOREIGN CORPORATION DEFINED; ITS
GENERAL STATUS**

- | | |
|--|---------------------------------|
| § 512. Foreign corporation defined. | § 514. Rights under the Federal |
| § 513. Right of corporation in other
than the home state. | Constitution. |

Sec. 512. Foreign Corporations Defined.

(Note: A foreign corporation is a corporation created by another legislative jurisdiction than the one in which its right to come to do corporate acts, to carry on business, to own property, is being considered. Thus an Illinois corporation is a foreign corporation in Indiana.)

**Sec. 513. Right of Corporation in Other Than the
Home State.**

Case No. 688. Empire Mills v. Alston Groc. Co., — Tex.
Ap. —, 12 L. R. A. 366.

DAVIDSON, J.: "Again, it may be said in this connection that 'it is a fundamental principle that the laws of a state can have no binding force, *proprio vigore*, outside of the territorial limits and jurisdiction of the state enacting them.' * * * 'Hence it follows that a state cannot grant to any person the right to exercise a franchise in a foreign state or country; for a franchise is the result of a law authorizing particular individuals to do acts or enjoy immunities which are not allowed to the community at large.' Morawetz, Priv. Corp. 1st ed. 500, 535.

"A grant of corporate existence is a grant of special privileges to the corporators, enabling them to act for certain designated purposes as a single individual, and exempting them (unless otherwise provided) from individual liability. The corporation, being the mere creation of local law, can have no legal existence beyond the limits of the sovereignty where created. It must dwell in the place of its creation, and cannot migrate to another sovereignty. The recognition of its existence even by other states and the enforcement of its contracts made therein depend purely upon the comity of those states.' Morawetz Priv. Corp. 1st ed. Sec. 500. * * *

"The rule of comity is entirely in subjection to the sovereign will of the state, and can only exist by permission of the state in which it is sought to employ it.
* * *,"

Question 688: Has a corporation a *right* to enter other states? By virtue of what does it enter?

Case No. 689. Paul v. Virginia, 8 Wall. 168.

MR. JUSTICE FIELD: " * * *

"Now a grant of corporate existence is a grant of special privileges to the corporators, enabling them to act for certain designated purposes as a single individual, and exempting them (unless otherwise specially provided) from individual liability. The corporation, being

the mere creation of local law, can have no legal existence beyond the limits of the sovereignty where created. As said by this Court in *Bank of Augusta v. Earle*, 13 Pet. 519, 10 L. Ed. 274: 'It must dwell in the place of its creation, and cannot migrate to another sovereignty.' The recognition of its existence even by other states, and the enforcement of its contracts made therein, depend purely upon the comity of those states—a comity which is never extended where the existence of the corporation or the exercise of its powers is prejudicial to their interests or repugnant to their policy. Having no absolute right of recognition in other states, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those states may think proper to impose. They may exclude the foreign corporation entirely, they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion."

Question 689: What does this case hold?

(Note: This case also held that the issuance of an insurance policy by a citizen of one state to a citizen of another, is not interstate commerce.)

Sec. 514. Rights Under the Federal Constitution.

Case No. 690. *Butler Bros. Shoe Co. v. U. S. Rubber Co.*, 156 Fed. 1.

SANBORN, J.: " * * *

"The review of the decisions of the Supreme Court relating to the power of a state to trammel or destroy the right of a corporation of another state to do business within its borders in which we have indulged may have

been tedious; but it may be profitable, if it serve to correct the erroneous view that such a corporation has no such right, and that all its powers and privileges without the limits of the state of its creation are at the mercy of any state in which it attempts to do business. It is not now, and it never has been, the law that no corporation of one state has any absolute right of recognition in other states, or that other states may exclude all the corporations of any state from doing any business within them, or that they may condition their transaction of such business by such terms as they may think proper to impose.

“The Constitution of the United States and the acts of Congress in pursuance thereof are the supreme law of the land. Under that Constitution and those laws a corporation of one state has at least three absolute rights which it may freely exercise in every other state in the Union, without let or hindrance from its legislation, or action:

“(1) Every corporation empowered to engage in interstate commerce by the state in which it is created, may carry on interstate commerce in every state in the Union, free of every prohibition and condition imposed by the latter. * * *

“Every corporation of any state in the employ of the United States has the right to exercise the necessary corporate powers and to transact the business requisite to discharge the duties of that employment in every other state in the Union without permission granted, or conditions imposed by the latter. * * *

“Every corporation of each state has the absolute right to institute and maintain in the federal courts, and to remove to those courts for trial and decision, its suits in every other state, in the cases and on the terms prescribed by the acts of Congress. * * *

“Every law of a state which attempts to destroy these rights or to burden their exercise is violative of the Constitution of the United States and void.”

Question 690: To what extent is the power of a state over foreign corporations limited by the United States Constitution?

CHAPTER ONE HUNDRED AND ONE

SAME SUBJECT: Continued

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|---|--|
| § 515. Usual provisions in the law affecting foreign corporations. | § 518. Penalty for non-compliance with foreign corporation law. |
| § 516. How corporations may enter a foreign state. | § 519. Jurisdiction of court over internal affairs of foreign corporation. |
| § 517. What amounts to transacting business within meaning of foreign corporation laws. | |

Sec. 515. Usual Provisions in the Law Affecting Foreign Corporation.

(Note: Of course the laws of the different states vary in their regulation of foreign corporations. The more common provisions are: that in order to qualify to do business, a foreign corporation must file a copy of its charter, state the names and addresses of its stockholders, directors and officers, state how much of its capital is to be represented in the state, pay certain fees, name an agent upon whom service of process may be made, etc., under penalty for non-compliance of a fine and inability to enforce contractual obligations.)

Sec. 516. How Corporation May Enter Another State.

(Note: A corporation may enter another state, and become there constructively present, as follows:

- (1.) By transacting business in another state.
- (2.) By performing isolated transactions, as bringing suit, making loans, holding meetings, and the like.
- (3.) By having property there.

(Edwards v. Schillinger, 245 Ill. 231. "It is the just and reasonable theory that a business corporation is constructively

present outside of the place of its origin whenever it has property and carries on its operations by means of its agents.”)

Sec. 517. What Amounts to Transacting Business Within Meaning of Foreign Corporation Laws.

(Note: When a corporation is in another state, the question whether it is “transacting business” there, within the meaning of the foreign corporation laws of that state is very important. If it is not transacting business there it need not comply with the foreign corporation laws, and it is not subject to the penalties fixed for non-compliance.)

Case No. 691. Kirven v. Virginia, Etc., Co., 145 Fed. 288.

DAYTON, D. J.: “* * *

“It has further been held that sales of goods by a foreign corporation to a resident of a state, although made by a salesman or agent sent into the state, to be shipped to him in the state from another state, belong to the operations of the interstate commerce and are not subject to these restrictive laws of the states. Also even though the business is done by the foreign corporation through an agent or firm resident in the state, and notes are given in settlement in the state payable in the state. It has, however, been held that this interstate commerce clause does not apply to foreign corporations maintaining continuously an agency in a state from which orders are solicited and the goods are delivered to purchasers.

“In construing the effect of these statutes in given cases, it has become frequently necessary for the courts to define what constitutes a ‘doing, transacting or carrying on a business,’ and, while there is some conflict, the greater weight of authority is to the effect that isolated transactions, especially commercial, between foreign corporations and a citizen of the state, do not constitute a ‘doing, transacting or carrying on a business,’ within the meaning of such statutes using these terms. It has so been held by the courts of Alabama, Arkansas, Colo-

rado, Illinois, Iowa, Kansas, Missouri, New Jersey, New York, Oregon, Pennsylvania, Tennessee, Texas, Washington, Wisconsin, and by the federal courts in such cases as *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727; *Frawley v. Penna Casualty Co.*, 124 Fed. 259; *Oakland Sugar Co. v. Wolf*, 118 Fed. 239. Among such instances of single transactions not constituting a 'doing of business within the meaning of the statutes' are the making of a single sale or contract of goods to a citizen and the taking of a mortgage in the state to secure payment therefor. * * *

And the taking of notes in the state for goods sold or a debt contracted in another state, and the suing thereon in the state, does not constitute such 'doing of business.'

* * * And these statutes cannot affect contracts made by a citizen outside of his state with a foreign corporation, as for instance, where an order is sent by the citizen for goods to the foreign corporation, or where such order is taken by a local agent, subject to the approval of the corporation, and is approved by the corporation outside the state, and the goods are shipped from outside the state by it to the purchaser in the state. * * *

Question 691: The A corporation organized under the laws of New Jersey, has its general office and factory in New York and opens up a branch office in Illinois, from which contracts are closed and goods are delivered to purchasers. It also has a traveling salesman in Massachusetts who solicits orders and sends them in to be approved and filled. It also purchases land in Ohio, and then, deciding not to open an office there, resells the same and takes back a mortgage. In which of these states must it comply with the foreign corporation law?

Case No. 692. *International Text Book Co. v. Pigg*, 217 U. S. 91.

Facts: Suit brought by International Text Book Co. to recover of Pigg a sum of money due for instruction in commercial law. Defense, that the plaintiff had not complied with the Kansas Foreign Corporation Law, and therefore in accordance with that law could not sue in the Kansas courts.

Point Involved: Whether the contract sued on involved interstate commerce, which the Kansas statute could not burden. What in general constitutes interstate commerce?

MR. JUSTICE HARLAN: “* * *

“It is true that the business in which the International Text-book Company is engaged is of a somewhat exceptional character, but, in our judgment, it was, in its essential characteristics, commerce among the states within the meaning of the Constitution of the United States. It involved, as already suggested, regular and, practically, continuous intercourse between the Text-book Company, located in Pennsylvania, and its scholars and agents in Kansas and other states. That intercourse was conducted by means of correspondence through the mails with such agents and scholars. While this mode of imparting and acquiring an education may not be such as is commonly adopted in this country, it is a lawful mode to accomplish the valuable purpose the parties have in view. More than that; this mode—looking at the contracts between the Text-book Company and its scholars—involved the transportation from the state where the school is located to the state in which the scholar resides, of books, apparatus and papers, useful or necessary in the particular course of study the scholar is pursuing and in respect of which he is entitled, from time to time, by virtue of his contract, to information and direction. Intercourse of that kind, between parties in different states—particularly when it is in execution of a valid contract between them—is as much intercourse, in the constitutional sense, as intercourse by means of the telegraph—‘a new species of commerce,’ to use the words of this Court in *Pensacola Telegraph Co. v. Western Union Telegraph Co.*, 96 U. S. 1, 9. In the great case of *Gibbons v. Ogden*, 9 Wheat. 1, 189, this Court, speaking by Chief Justice Marshall, said, ‘Commerce, undoubtedly, is traffic, but it is something more; it is intercourse.’ Referring to the constitutional power of Congress to regulate commerce

among the states and with foreign countries, this Court said in the *Pensacola* case, just cited, that 'it is not only the right but the duty of Congress to see to it that intercourse among the states and the transmission of intelligence are not obstructed or unnecessarily encumbered by state legislation.' This principle has never been modified by any subsequent decision of this Court.

"The same thought was expressed in *Western Union Tel. Co. v. Pendleton*, 122 U. S. 347, 356, where the Court said: 'Other commerce deals only with persons, or with visible and tangible things. But the telegraph transports nothing visible and tangible; it carries only ideas, wishes, orders and intelligence.' It was said in the Circuit Court of Appeals for the Eighth Circuit, speaking by Judge Sanborn, in *Butler Bros. Shoe Co. v. United States Rubber Co.*, 156 Fed. Rep. 1, 17, that 'all interstate commerce is not sales of goods. Importation into one state from another is the indispensable element, the test, of interstate commerce; and every negotiation, contract, trade, and dealing between citizens of different states, which contemplates and causes such importation, whether it be of goods, persons, or information, is a transaction of interstate commerce.' If intercourse between persons in different states by means of telegraphic messages conveying intelligence or information is commerce among the states, which no state may directly burden or unnecessarily encumber, we cannot doubt that intercourse or communication between persons in different states, by means of correspondence through the mails, is commerce among the states within the meaning of the Constitution, especially where, as here, such intercourse and communication really relates to matters of regular, continuous business and to the making of contracts and the transportation of books, papers, etc., appertaining to such business. In our further consideration of this case we shall therefore assume that the business of the Textbook Company, by means of correspondence through the mails and otherwise between Kansas and Pennsylvania, was interstate in its nature."

Question 692: (1.) Define interstate commerce; what does it include?

(2.) Can a state restrict interstate commerce? Why?

Sec. 518. Penalty for Non-compliance With Foreign Corporation Law.

Case No. 693. Fruin-Colnon Contracting Co. v. Chatterton, 146 Ky. 540.

CARROLL, J.: "She set up that the appellant had failed to comply with this statute and hence could not recover against her on the contract made with the board of public works for the street improvement. In a reply, appellant admitted that when the contract was awarded and the work completed it had not complied with the statute, but averred that it did so afterwards, and in November, 1909. Chancellor Miller, now a judge of this court, ruled that, under the facts admitted in the pleadings, the plaintiff could not recover and entered a judgment dismissing the petition. On this appeal, the only question presented is, Did the failure of the appellant to comply with the statute before making the contract and completing the work under it deny it the right to recover the cost of the improvement? * * *

"With the question of estoppel out of the way, the exact matter for decision is, Will a foreign corporation be assisted by the courts of this state to enforce a contract that was entered into and completed at a time when it was unlawful for the corporation to carry on in this state the business it was engaged in, and out of which the contract arose? The statute does not provide that contracts entered into before it has been complied with shall be void or nonenforceable, nor does it use any language in reference to the contract; but, when a statute makes it unlawful to do business under certain conditions, it seems to necessarily and logically follow that the doing of the business under the prohibited conditions is in itself unlawful. When the doing of the act is made un-

lawful, there is no reason why the statute should also declare that contracts made in violation of it should also be unlawful. When the law prohibits a thing, it is unlawful to do it, and the courts should not lend their aid to the enforcement of prohibited contracts. Courts are established to afford remedies to litigants who seek relief growing out of lawful transactions, and not to aid those who would invoke their assistance to enforce contracts made in violation of law. Their chief purpose is to secure the observation of laws enacted for the safety and protection of life and property and the general well-being of the people, and it would be a startling departure from this purpose if they should also give relief to parties who are seeking to enforce contracts made in violation of law. Such a course of procedure would be a perversion of justice, and convert the courts into instruments to aid lawbreakers, in place of punishing them. It is also argued that it would be a hardship on this corporation to lose the value of its work, but this furnishes no excuse why it should obtain relief, as there is scarcely a penal statute the enforcement of which does not impose severe burdens; and if the severity of the punishment should be treated as a reason for disregarding the statute, many beneficial laws would be unenforced.

“Our attention has been called by counsel for appellant to authorities from other states, holding that the courts will not deny relief in cases of this character, but will leave the offending corporations to be punished under that penalty feature of the statute. That there is much diversity of opinion on the subject under consideration to be found in the decisions of the courts of other states cannot be doubted by any person who has examined the cases, but we think the weight of authority supports the principle that when a statute expressly declares that it shall be unlawful to do business until its requirements shall have been complied with, a contract made in contravention of the statute will not be enforced by the courts. * * *

Question 693: What was the defense made in this case? How was this defense met? Did the defense prevail? Are all the states in accord on this question?

Sec. 519. Jurisdiction of Court Over Internal Affairs of Foreign Corporation.

Case No. 694. Babcock v. Farwell, 245 Ill. 14.

Facts: Suit in the Illinois courts, by a stockholder of a corporation organized under laws of Great Britain to set aside certain contracts made between the corporation and Farwell declared void and to compel an accounting. Defense, that the Illinois Court has no jurisdiction over internal controversies in the corporation.

MR. JUSTICE DUNN: "The general rule has been declared by the decisions of many courts and has been stated by text writers to be, that the courts of one state will not exercise the power of deciding controversies relating merely to the internal management of the affairs of a corporation organized under the laws of another state or of determining rights dependent upon such management. * * *

"As stated in Thompson on Corporations, *supra*, this doctrine obviously has its limitations. Except in cases involving the exercise of visitorial powers, the question is not strictly one of jurisdiction but rather of discretion in the exercise of jurisdiction. The reasons which influence courts of chancery to refuse to interfere in the management of the internal affairs of a foreign corporation are, that the rights arising between a corporation and its members out of such management depend upon the laws under which the corporation is organized; that the courts of that state afford the most appropriate forum for adjudication upon the relation between the stockholders and the corporation, and that frequently such courts alone possess power adequate to the enforcement of all decrees that justice may require. It is the

inability of the Court to do complete justice by its decree, and not its incompetency to decide the question involve i, that determines the exercise of its power. The general statement that courts will not interfere with the management of the internal affairs of foreign corporations must be construed in connection with the particular facts. The rule rests more on grounds of policy and expediency than on jurisdictional grounds; more on want of power to enforce a decree than on jurisdiction to make it. Where the wrongs complained of are merely against the sovereignty by which the corporation was created or the law of its existence, or are such as require for their redress the exercise of the visitorial powers of the sovereign, or where full jurisdiction of the corporation and of its stockholders is necessary to such redress, the courts will decline jurisdiction. Examples of such cases are suits to dissolve a corporation; to appoint a receiver; to determine the validity of its organization or which of two rival organizations is legal; to restrain it from declaring a dividend or compel it to make one; to restrain an issue of stock or of bonds; to compel a division of its assets; to restore a stockholder to his right to vote at stockholders' meetings from which he has been excluded, or to compel the recognition of one claiming to have been elected a director. * * *

“Where, however, the relief sought is within the general jurisdiction of a court of chancery, where all the parties necessary to the full and proper adjustment of the rights involved are before the Court and where the relief sought does not require the exercise of the visitorial power of the government, we think the Court should exercise the power of determining controversies brought before it instead of remitting suitors to a foreign jurisdiction.” .

Question 694: Will a Court take jurisdiction to decide controversies in internal management of foreign corporations? When does the Court not have jurisdiction? Name eight matters that a Court will not decide in reference to a foreign corporation.

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